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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 229.

HEWITT, NORTON & COMPANY, APPELLANTS,

vs.

A. J. PHELPS AND MARY B. PHELPS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

FILED AUGUST 19, 1879.

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1 UNITED STATES OF AMERICA,
Southern District of Mississippi:

Pleas and procedings had and done at a regular term of the circuit court of the United States for the southern district of Mississippi, begun and held, pursuant to law, in the court-room of said court, in the city of Jackson, in said district, on the 1st Monday, being the 6th day, of May, in the year of our Lord one thousand eight hundred and seventy-eight.

Present and presiding, the honorable W. B. Woods, U. S. circuit judge fifth circuit. Present also, honorable R. A. Hill, U. S. district judge for Mississippi; Thomas W. Hunt, marshal of said district; and George T. Swann, clerk of said court, by his deputy, J. M. McKee.

2 HEWITT, NORTON & CO.
vs.
A. J. PHELPS & WIFE ET AL.

Be it remembered that heretofore, to wit, on the 18th day of September, A. D. 1877, the following transcript of proceedings had in the chancery court of Washington County, State of Mississippi, in the above-styled cause, was filed in the office of the clerk of the circuit court of the United States for the southern district of Mississippi, in the words and figures following, to wit:

3 Pleas before the honorable B. F. Trimble, judge of the third judicial district of the State of Mississippi, sitting in & for the county of Washington, in said district, & sole presiding therein, in the following-entitled cause, to wit:

HEWITT, NORTON & CO.
vs. } #298.
A. J. PHELPS, WIFE, ET AL.

Be it remembered that on the 17th day of April, 1869, complainants, Hewett, Norton & Co., filed in the office of the clerk of the chancery court of Washington County, Mississippi, their original bill of complaint against the said defendants, A. J. Phelps & wife et al., which said bill of complaint is in the words & figures following, to wit:

To the honorable B. F. Trimble, judge of the third judicial district of the State of Mississippi, sitting in chancery for the county of Washington:

4 The bill of complaint of M. O. H. Norton, R. Atkinson, and Arthur L. Stuart, surviving partner' of the firm of Hewett, Norton & Co., late of New Orleans, Louisiana, complainants, against A. J. Phelps and Mary B. Phelps, his wife, both of the county of Washington, Mississippi, defendants, & Jona. Pearce, trustee, defendants:

Humbly complaining, your orators would respectively show unto your honor and state that the defendants Mary B. Phelps is the sole heir at law and distributee of Sarah Vick, now deceased, and as such is in possession of the property hereinafter mentioned. That on the 4th day of May, 1850, the said Sarah Vick and Henry W. Vick, her husband, executed and delivered to one Jonathan Pearce a deed in and by which they bargain', sold, conveyed, and transferred to the said

Pierce all the property of every kind & description, including debts, judgments, and choses in action, which the said Sarah Vick then held and owned as her separate property; that is to say: All her property in the city of Louisiana, Kentucky; all her property, real and per-
5 sonal, including her house and lot, household and kitchen furniture, slaves, horses, carriages, &c., in the city of Vicksburg; also all her property, consisting of wild lands, in Issaquena County; also all of her property of every kind and description in Washington County, Mississippi, consisting of the plantation, slaves, planting utensils, horses, mules, stock, corn, &c., in a word, all of her property of every kind and description in said Washington County; also the furniture, horses, and other property she was to receive from Col. Durden, as trustee for Col. Vick's creditors, in part payment of the debt due to her in said trust; also the balance due her, whatever it might be, coming to her as one of the creditors in said trust in the hands of Col. Durden; it being her intention, as expressed in said deed, to convey to said Pearce all her separate property of every kind and description, wheresoever situate, nevertheless upon the trusts following, that
6 is to say:

1. For the sole, separate, and exclusive use of the said Sarah Vicks during her natural life.

2. After the death of said Sarah Vick, the Louisville property to be for the use and benefit of her children then living & such other children as she might thereafter have, the rents to be applied as hereinafter stated.

3. The balance of her property conveyed to be held for the use and benefit of all her children living at the time of her death, to them and their heirs forever.

4th. The proceeds of her property in Washington and Issaquena Counties, and such parts of it as might be sold, to be applied to the payment of the debt due from said Sarah Vick to the trustees of the Bank of the United States, and after payment of that debt the proceeds of the property over what was necessary to support the plantation and the family was to be invested for the benefit of all her children living at the
7 time of her death; provided, however, the said Sarah Vick was to retain the possession of all said property during her life, with power to sell or exchange any part she might think proper, the proceeds of the sale, however, to be applied to the payment of the debts due the trustee of the Bank of the United States, and such property as was secured in exchange was to be subject to the trusts of said deed in the same manner that the property for which it was exchanged was subject; provided, further, said trustee was to permit the said Henry W. Vick, as agent for said trustee, and as agent & trustee for said Sarah Vicks during her life, and as agent and trustee for her children after her death, to superintend, possess, manage, and control said property for the benefit of all concerned; said Henry W. Vick was to have power to sell and exchange said property after the death of said Sarah Vick
8 and to apply the proceeds to the payment of the debt due to the trustee of the Bank of the United States, or if the said debt is paid, the proceeds of the sale to be reinvested and be subjected to the trusts of this deed; provided, further, that any balance which may be due to said Sarah Vick from the trust property in Col. Durden's hands may be applied by said Henry W. Vick to pay Doctor Crump, Jno. Cobb, Dr. Emanuel Woodman, or to compromise or settle the debt which Hill, McLean & Co. have sued Col. Durden for, and also to settle a debt due to L. B. Wheeler & Co., but Dr. Crump's debt was to be first

paid, John Cobb's next, Doctor Emanuel and Woodman's next, then Hubbard & Wheeler, then McLean & Co., but all the debts to be paid by Col. Vick if he is able to do so, and it is only in case he is not able that it is to be paid out of said fund; provided, further, that said property is always to stand charged for the payment of such amount
9 as may be necessary for the liberal support and maintainance of the said Henry W. Vick during his natural life; provided, further, that the rents of said Louisville property were to be collected yearly and placed in the hands of Henry and James Ann Pendill, to defray the expenses of educating and supporting the children of said Sarah Vick; provided, further, that out of what was coming to her from the trust property in Col. Durden's hands a debt of $500 and interest should be first paid G. W. Taylor. It was further expressed in said deed that it was the intention of said Sarah Vick that the said Henry W. Vick should be regarded, for the purposes of this deed, not merely as an agent, but also a cotrustee, and she desired that he should be required to give no security for the performance of his duties, and said Pearce was in no manner to be responsible
10 for the acts and conduct of said Henry W. Vick.

Deed trust. Exhibit A.

Which said deed was properly executed and recorded, and the copy of the same is herewith filed as Exhibit A, & prayed to be taken as a part of this bill.

Your orators further show unto your honor that all the children of the said Sarah Vick, except the said Mary B. Phelps, died without issue them surviving, and intestate, and that the said Mary B. Phelps is the sole surviving heir at law and distributee of the said Sarah Vick, and the only person in being beneficially interested in the property conveyed by said deed of trust; that the said Henry W. Vicks has long since departed this life; that on the 5th day of April, A. D., 1861, and after the death of the said Henry W. Vicks, the said Jonathan Pearce, as the trustee under the said deed, took possession actual of the trust property, and especially of the plantation, slaves, &c., of the said
11 Sarah Vicks in the county of Washington, Mississippi, said property being then heavily encumbered with debt, and proceeded to the execution of the powers conferred upon him, and in the month of June, 1861, was duly and legally appointed and qualified as the guardian of the person and estate of the said Mary B. Phelps, then unmarried and nineteen years of age. That the said Pearce, as the trustee for the Sarah Vick, and as guardian for the said Mary B., accounted regularly to the probate court of the said county of Washington, of and concerning all and singular his actings and doings as such trustee & guardian. That in the month of October, 1865, the said Pearce, as such trustee & guardian, exhibited to the said probate court a final account, from which it appears he was indebted to the estate he represented $2,768.53, all of which has since been paid to or arranged with the said Mary B. That as an accompaniment to and explanatory of said
12 final account the said Jona. Pearce made a report in writing to the said probate court, in which he represented to the said court that the estate of the said Sarah Vick & Mary B. Phelps was justly indebted to your orator's said house of Hewitt, Norton & Co. in the sum of ten thousand three hundred and seventy-seven & $\frac{80}{100}$ dollars, which was entitled to a credit of four thousand and seventy-six $\frac{10}{100}$ dollars, having a balance due of six thousand three hundred and one $\frac{71}{100}$ dollars as of that date, which said report was duly sworn to, and a copy of which is herewith filed as

Final ac. and report of Pearce. Mark' E. B. & C.

Report of Pearce filed. Exhibit D.

Exhibit D, and prayed to be taken as part hereof. That the said final account and report was, after due proceedings had, allowed and confirmed by the said probate court, and by the order and decree allowing and confirming the same the said Pearce was discharged from the further execution of his trust, a copy of which decree is herewith filed as Exhibit E, and prayed to be taken as a part of this bill. That shortly after the execution or making of the final account & report, at the request of the said Mary B. Phelps, the said Pearce, trustee, executed and delivered to her a deed conveying all the property in the county of Washington, Mississippi, embraced in the deed of trust aforesaid, and of which he had for several years been in possession and managing as trustee and guardian as aforesaid. That the said Mary B. Phelps, conjointly with the said A. J. Phelps, her husband, at once took possession of the said property, and have ever since been in possession thereof, receiving the rents, issue, and profits thereof. That the said Pearce, as such trustee and guardian, exhibited to the said Mary B. Phelps, after she became of age and prior to her intermarriage, a statement of the said final account and report hereinbefore mentioned, showing the indebtedness due your orators' said house, and after proper examination and with a full knowledge of the matter, she ratitfied, agreed to, and accepted the same, and suffered and permitted the said Pearce to be discharged from the execution of his said trust, whereby your orators charge they are wholly without any recourse as against the said trustee, and are unable through his agency to obtain payment of their said debt, and to have the same in any manner secured. Further complaining, your orators state that subsequent to the rendition of the said final account and report, but before the discharge of said Pearce, they paid on his order to one S. P. Perkins, who was stated in said report to be a creditor of said trust fund, the sum of nine hundred and seven $\frac{18}{100}$ dollars, and to said trustee himself, on an allowance made to him by the said probate court, the sum of fifteen hundred and eighty-seven $\frac{56}{100}$ dollars, out of the proceeds of some twenty bales of cotton shipped to them by said Pearce. That on the 3rd day of October, 1866, they rendered to the said Pearce an account current of that date, showing a balance due them of seven thousand six hundred & thirty-one $\frac{16}{100}$ dollars, which said account was by said Pearce admitted to be correct and due and owing. That the said account current was duly exhibited to the said Mary B. & A. J. Phelps, who, after one examination, admitted the same to be a correct and a legal and proper charge against them, and a liability for which the said trust estate was bound, a copy of which account is herewith filed as Exhibit F. That the said account due them was for supplies and money advanced to the said Henry W. Vick and Jona. Pearce, trustees as aforesaid, for the support and maintenance of the said plantation in said county of Washington, and of the said Henry W. Vick and Mary B. Phelps, in strict accordance with the terms and tenor of the said deed of trust, notwithstanding which, tho' often requested, the said defendants have hitherto wholly failed and refused, and still fail & refuse, to pay the same or any part thereof, and your orators charge that the balance stated to be due them on the said 3rd day of October, A. D. 1866, remains and is wholly due and unpaid. Your orators are advised that they have no rights of action at law against the said Mary B. Phelps of and concerning the said last-mentioned balance due them, but that the trust properly under and by virtue of the deed of trust aforesaid stands charged with the

F Decree allowing final account. Exhibit E.

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Ac. current, Oct. 3, '66. E. F.

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16

payment thereof, and is bound and liable therefor in the hands of the said Mary B., the cestue qui trust, the said Jona. Pearce, trustee, having been released and discharged from his trust, unless your honor should adjudge that the acceptance of the deed from said Pearce
17 by said Mary B. after she became of age, which your orators charge the fact to be, would give your orators a right of action as against her at law.

The premises considered, your orators pray that the said Mary B. Phelps and A. J. Phelps, her husband, and Jona. Pearce, trustee, be made parties defendant hereto and compelled to answer all and singular the allegations of this bill, and, if specially interrogated, that an account be taken and stated of the amount due your orators, and the said trust property conveyed to and now in the possession of the said Mary B. and A. J. Phelps be decreed to be bound for payment of the amount ascertained to be due your orators; that the said defendants be decreed to pay the same within some short day to be named, & in default thereof that the said property, a particular description of which your orators do not now know, but when ascertained pray that they be allowed to annex hereto by way of amendment, which
18 said property situated in Washington County, State of Mississippi, is particularly described as follows, to wit: The east ½ of N. W. ¼ of section 28; S. W. ¼ of sec. 33; S. W. ¼ & W. ½ of N. W. ¼ section 28; all section 29; all section 30; N. ½ section 31; N. ½ section 32; W. ½ of N. W. ¼ section 33, all in township 14, range 6, and all section 36, in township 14, range 7, be sold, or so much thereof as may be of value sufficient to pay the same; or if your honor should be of opinion that only the rents and profits of the said plantation can be applied to the payment of your orators' said debt, and that the same can only be so applied through the intervention of a trustee, and that the release of and conveyance by said Pearce are null & void, your orators, in that event, pray that, after proper proceedings had, either the said Pearce, as trustee under said deed of trust, or some other suitable person
19 to be appointed trustee by your honor, be requested to take possession of the said plantation and superintend, manage, and control the same, according to the exigency of said trust deed, and out of the rents and income thereof to pay your orators said debt; or if mistaken in the relief sought, then for such other and further and general relief & decree as to equity belongs & your orators' case requires. May it please your honor to grant your orators the State's most gracious writ of subpœna, directed, &c., commanding, &c.; and as in duty bound your orators will ever pray, &c.

NUGENT & YERGER,
Sol's for Compl'n's.

STATE OF LOUISIANA,
City of New Orleans:

Personally appeared before me, a commissioner of the State of Mississippi, resident in the city and State aforesaid, Arthur L. Stuart, esquire, one of the late firm of Hewett, Norton & Co., who, being
20 sworn, says that the matters and things stated in the foregoing bill as of his knowledge of said firm are true, and those stated as of the information of others he verily believes to be true.

A. L. STUART.

Sworn to and subscribed before me this thirteenth day of April, A. D. 1869.

ROBERT I. KER,
Commissioner for the State of Mississippi in Louisiana.

And on the 17th day of April, 1869, Exhibit A referred to in the foregoing bill was filed herein, in the words & figures following, to wit:

This indenture, made and entered into this 4th day of May, A. D. 1850, between Henry W. Vick and Sarah Vick, his wife, of the first part, & Jonathan Pearce, of the second part, witnesseth: That whereas the said Sarah Vick is desirous to make a settlement of her property by way of a deed of trust; and whereas she has the most implicit confidence in the prudence and good management of her husband, Henry W. Vick, and believes it would be greatly to his interest and the interest of her children that he should possess and control her property, which she wishes him to do: Now, for the consideration aforesaid, and for the further consideration of ten dollars to her in hand paid, the receipt of which is hereby acknowledged, the said parties of the first part have bargained, sold, conveyed, and transferred, and by these presents do bargain, sell, convey, and transfer, to the said Jonathan Pearce and his heirs, all the property of every kind & description, including debts, judgments, & choses in action, which she, the said Sarah Vick, holds and owned as her own separate property; that is to say: All her property in the city of Louisville, Kentucky; all her property, real and personal, including her house and lot, household and kitchen furniture, slaves, horses, carriages, &c., in the city of Vicksburg; also all her property, consisting of wild lands, in Issaquena County; also all of her property, of every kind and description, in Washington County, Mississippi, consisting of the plantation, slaves, planting utensils, horses, mules, stock, corn, &c., in a word, all of her property of every kind & description in said Washington County; also the furniture, houses, and other property she is to receive from Col. Durden, as trustee for Col. Vick's creditors, in part payment of the debt due to her in said trust; also the balance due to her, whatever it may be coming to her, as one of the creditors in said trust in the hands of Col. Durden. It being the intention of said parties of the first part to convey to said Jonathan Pierce all of the separate property of said Sarah Vick of every kind and description wheresoever the same is situated, to have and to hold the aforesaid property, debts, choses in action to the said Jonathan Pierce and his heirs forever, upon trust nevertheless: First, in trust for the sole, separate, and exclusive use of the said Sarah Vick during the term of her natural life; second, after the death of said Vick, the Louisville property to be for the use and benefit of her children now living and such other child or children as she may have, the rents to be appropriated as hereinafter directed; third, the balance of her property above conveyed to be held for the use and benefit of all her children living at the time of her death, to them and to their heirs forever; fourth, the proceeds to her said property in Washington and Issaquena Counties, and such parts of it as may be sold, to be applied to the payments of the debt due from Sarah Vick to the trustee of the Bank of the United States, and after payment of that debt the proceeds of the property, over what is necessary to support the plantation and the family, are to be invested for the benefit of all her children living at the time of her death; provided, however, that she is to retain possession of all said property during her life, with power to sell or exchange any part she may think proper, the proceeds of the sale, however, to be applied to the payment of the debt due to the trustee of the Bank of the United States, and such property as is received in exchange is to be subject to the trusts of this deed in the same manner that the property for

which it was exchanged was subject; provided, further, that said trustee is to permit the said Henry W. Vick, as agent for said trustee, and as agent and trustee for said Sarah Vick during her life, and as agent and trustee for her children after her death, to superintend, possess, manage, and control said property for the benefit of all concerned; said Henry Vick is to have power to sell and exchange said property after the death of said Sarah Vick and apply the proceeds to the payment of the debt due to the trustee of the Bank of the United States; or if the said debt is paid, the proceeds of the sale to be reinvested & be subject to the trusts of this deed; provided, further, that any balance which may be due to Sarah Vick from the trust property in Col. Durden's hands may be applied by said Henry W.
26 Vick to pay Doct. Crump, Jno. Cobb, Doct. Emanuel, & Woodman, & to compromise or settle the debt which Hill, McLean & Co. have sued Col. Durden for, and also to settle a debt due to T. B. Wheeler & Co., but Doct. Crump's debt is to be first paid, John Cobbs next, Doct. Emanuel & Woodman next, then Hubble & Wheeler, then Hill, McLean & Co., but all the debts to be paid by Col. Vick, if he is able to do so, and it is only in case he is not able that it is to be paid out of said fund; provided, further, that said property is always to stand charged for the payment of such amount for the liberal support & maint*ai*nance of the said Henry W. Vicks during his natural life; provided, further, that the rents of my Louisville are to be collected yearly & placed in the hands of Henry & James Ann Pendle, to defray the expenses of educating and supporting my children; provided, further, that out of what is coming to me from the trust
27 property in Col. Durden's hands; I desire that a debt of $500 & interest shall be first paid G. W. Taylor. My intention is that said Henry W. Vick shall be regarded for the purposes of this deed, not merely as an agent, but also a cotrustee, and I desire he may be required to give no security for the performance of his duties, and the Jonathan Pierce is not in any manner to be responsible for the acts or conduct of said Henry W. Vicks.

In witness whereof the parties of the first part have hereto signed their names and affixed their seals the day & year first above written.

H. W. VICK. [SEAL.]
SARAH VICK. [SEAL.]

THE STATE OF MISSISSIPPI,
Warren County, ss:

Personally appeared before me, Henry F. Cook, judge of probates for said county, the within-named Henry W. Vick and Sarah Vick,
28 who severally acknowledged that they signed, sealed, and delivered the foregoing deed as their own act & deed on the day and year therein mentioned, and for the purposes therein expressed; and the said Sarah Vick, on a private examination separate and apart from her husband, Henry W. Vick, acknowledged that she signed, sealed, and delivered the foregoing deed as her voluntary act & deed, freely without any fear thereto or compulsion of her husband.

Given under my hand and seal this the 4th day of May, A. D. 1850.

H. F. COOK. [SEAL.]

THE STATE OF MISSISSIPPI,
Warren County, ss:

I, Edwin B. Scarbrough, clerk of the probate court in and for said county, do hereby certify that the foregoing deed and certificate was

filed for record in my office on the 4th day of May, A. D. 1850.
29 Whereupon I have made the same of record in book W, pages 524, 525, 526.

Given under my hand and seal of office this 8 May, A. D. 1850.

[L. S.] E. B. SCARBROUGH, *Clerk.*

STATE OF MISSISSIPPI,
Warren County, ss:

I, Charles E. Yeamans, clerk of the probate court of said county, do hereby certify that the foregoing pages contains a true and perfect copy of the original deed of trust from Henry W. Vick and Sarah Vick, his wife, to Jonathan Pearce, trustee, as the same remains of record in my office.

Given under my hand & seal of office, at Vicksburg, this the 19th day of January, A. D. 1857.

[L. S.] C. E. YEAMANS, *Clerk,*
By C. A. HAINS, *D. C.*

THE STATE OF MISSISSIPPI,
Washington County:

I, Jno. Fawn, clerk of the probate court in and for said
30 county, hereby certify that the foregoing is a full, true, & correct copy of the original deed of trust as the same appears of record in my office.

Given under my hand & official seal this 17th day of April, A. D. 1869.

[L. S.] JNO. FAWN, *Clerk.*

31 Exhibit D referred to in the foregoing bill of complaint is in the words & figures following, to wit:

To the Hon. L. B. Vallant, judge of probate court of Washington County, Mississippi:

Your petitioner, Jno. Pierce, would respectfully report that he filed herewith a memorandum of the property he found on the estate of Sarah Vick in May, 1861, when he took possession as trustee, and the disposition of same; also his cash a/c as trustee of estate of Sarah Vick and guardian of Mary B. Vick, showing a cash balance due the estate of $2,768.53 dollars, and a further sum of one hundred and seventy $\frac{87}{100}$ dollars also due for particulars. (See a/c marked E, making in total of $2,939.40 dollars due to the estate.) He has not credited himself in the a/cs with anything except in a/c marked E, praying the honorable court to make him a just & reasonable compensation for the responsibility attaching and his personal services in the
32 management in person on the estate since in May, 1861, and would ask the court for a release from any further liability as trustee and as guardian of Mary B. Vick, she being of lawful age and having married Alonzo J. Phelps, whose receipt the court will find at bottom of property account for property on hand. He also filed herewith a/c current, m'ked B, of Messrs. Hewett, Norton & Co., for supplies, showing transactions with Col. H. W. Vick, trustee, to & including April 25, '61, am't'g to $6,145.99, and with your petitioner, as for their a/c balance, 4,231.82. Total bal. due them, as per a/c m'k'd B, 10,377.81, which is entitled to a credit of 4,076.10, as per a/c marked F, which does not appear on B, and reduces it that amount, leaving a balance

due them of $6,301.71. The estate is indebted to S. P. Perkins, for overseeing, a balance of $907.18, as per ⅋43, and would ask the court
33 if interest should be paid on it. Is also indebted to Dr. D. D. Jackson for medical services, bill not yet rendered, but about balanced, by the sum of $705.90 dollars he owes the estate, as per ⅋ marked 9. Dr. Chaney rendered a bill of $102.50 for medical services, two visits, which petitioner declines paying because of the exorbitances of the charges. The estate owes J. O. Stevens a small balance say 10 to 15$, and to Southern Railroad Company 35 to 40$ for a brick-wheel, contracted by your petitioner, and is indebted to other persons, contracted by Col. H. W. Vick, as trustee, before his death in April, 1861. Your petitioner would further represent that he exchanged cotton osnaburgs and corn with Mr. E. Mount for wool & lumber, which was consumed on the place, but most of the lumber was destroyed by the negroes; also exchanged hides for leather with A. H. Bibb & Co., to make & mend shoes for the negroes. He has
34 no vouchers for the exchanges, but would state that they were even in products. All of which is respectfully submitted.

JONA. PEARCE,
Trustee Estate of Sarah Vick and Guardian Mary B. Vick.

The estate also indebted to Mr. Devers in a small amount for fixing the corn-mill before and since the death of Col. H. W. Vick, trustee, and also for taxes since 1861, except the small am'ts paid by me as per my cash account, and there may other small debts contracted by myself which I may not now remember, as I had forgotten Mr. Devers and the taxes when I wrote my report.

JONA. PEARCE,
Trustee of Estate of Sarah Vick and Guardian of Mary B. Vick.

Subscribed and sworn to before me this Nov. 28, 1865.

W. A. HAYCRAFT, *Clk.*

35 STATE OF MISSISSIPPI,
Washington County:

I, John Fawn, clerk of the probate court, hereby certify that the foregoing is a true and correct copy of the original report as the same remains on file in my office.

Given under my hand and seal this 17th day of April, 1869.

[SEAL.] JOHN FAWN, *Clerk.*

36

Exhibit E to the foregoing bill of complaint is in the words & figures following, to wit:

In the matter of the final account of J. Pearce, guardian of Mary B. Vick.

This cause coming on to be heard this day, and it appearing to the court from the proof adduced that publication has been duly made according to a previous order of this court citing A. J. Phelps and Mary B. Phelps, his wife, to be & appear before this court on the fourth Monday in January, 1866, to show cause why the final account of Jonathan Pearce herein should not be allowed, and the said final account being unexcepted to, and the court being sufficiently advised of and concerning the same, it is therefore ordered by the court that the said final ac-

count showing a balance due Mary B. Phelps, formerly Mary B. Vick, of $2,768.53, be, and the same is, in all things conformed & allowed;
37 and it is also ordered, adjudged, and decreed that the said Jonathan Pearce, guardian as aforesaid, be allowed out of the estate of said Mary B. Phelps the sum of six thousand dollars as compensation for his trouble & labor in managing and controling the business of said ward, and also the sum of ten dollars, the amount by him expended for the publication aforesaid, and also the sum of thirty dollars, for his costs in this matter expended. And it is further ordered, adjudged, and decreed that the said guardian and he is hereby, discharged from further responsibility herein.

L. B. VALLIANT,
Judge, &c.

THE STATE OF MISSISSIPPI,
Washington County:

I, Jno. Fawn, clerk of the probate court in & for said county, hereby certify that the foregoing is a full, true, & correct copy of the
38 original decree as the same appears of record in my office.

Given under my hand & official seal this 17th day of April, A. D. 1869.

[L. S.] JNO. FAWN, *Clerk.*

EXHIBIT F.

(Copy.)

Exhibit F to the foregoing bill of complaint is in the words & figures following, to wit:

a/c with Hewitt, Norton & Co.:

1864.							
June	30.	By cash from R. Atkinson, paid him by H. C. Pendle, 16 May.....	4,076	10	825	747	28
1866.							
Jan'y	5.	" per sales 20 bales cotton per Grey Eagle.....	3,887	57	271	234	09
		" balance interest our favor.....				2,722	28
		" balance a/c due us.....	7,631	16			
			15,594	83		3,703	65

Subpœna.

39 And on the 16th day of April, 1869, subpœna was issued herein in the words & figures following, to wit:

The State of Mississippi, chancery court of Washington County, to Mary B. Phelps, A. J. Phelps, greeting:

For certain causes offered before us in our chancery court of Washington County, we command and strictly enjoin you that, laying all other matters aside, and notwithstanding any excuse, you personally appear in the chancery court of said county, at the next May term thereof, to be held in Greenville on the second Monday in May next, then and there to answer bill of complaint exhibited against you, Mary B. and A. J. Phelps, by M. O. H. Norton, A. Atkenson, Arthur L. Stuart, surviving partners of the firm of Hewitt, Norton & Co,, late of New Orleans, La., complainant in said court; and further to do and

40 perform what our said court shall have considered of in this behalf; and this you shall in nowise omit, under the penalty prescribed by law. And have then there this writ.

To the sheriff of Washington County to execute & return.

Given under my hand and official seal this 16th day of April, A. D. 1869.

[SEAL.] JNO. FAWN, *Clerk.*

Endorsed on the foregoing writ is the return of the sheriff, in the words & figures following, to wit:

Rec'd 17th April, 1869.

T. K. PREUSS, *Sh'ff.*
By J. H. ROBB, *D. S.*

Returned executed by reading the within subpœna personally to the within-named A. J. Phelps & wife, Mary B. Phelps, and by delivering to each of them a true copy of the same, this 5th day of May, A. D. 1869.

T. K. PREUSS, *Sh'ff.*
By J. R. TEVINER, *D. S.*

41 *Demurrer.*

And on the 11th day of May, 1869, an order granting leave, &c., was made herein, and entered on the minutes of said court, in the words & figures following, to wit:

HEWITT, NORTON & CO.
vs. } 298.
A. J. PHELPS & WIFE.

This day came the defendants, and, by solicitors, enter their appearance herein, and thereupon, by consent of parties, leave is given defendants to plead answer or demur to complainants' bill on or before the first day of the next term of this court, without prejudice to complainants' right to set the same down for hearing at that time.

42 And on the 10th day of Nov., 1869, demurrer of defendants was filed herein in the words and figures following, to wit:

Chancery court of Washington County, November term, 1869.

HEWETT, NORTON & CO.
vs. } #298. Chancery.
A. J. PHELPS AND MARY B. PHELPS.

The defendants, A. J. Phelps and Mary B. Phelps, his wife, by protestation, and not confessing or admitting all or either of the allegations or statements made or contained in said bill of complaint to be true in manner and form as the same are therein set forth, say complainants have not by their said bill of complaint made or stated such a case as entitled them to have the relief prayed for against defendants, nor to any relief, decree, or discovery against them, and they therefore demur thereto, and for cause demurrer defendants show—

43 1st. Complainants have not made the necessary parties to said

bill; the said Jonathan Pearce should have been made a party defendant thereto.

2nd. The said probate court has no legal authority to settle the accounts of the said Pearce as trustee, nor to make him any allowance, nor to discharge him as such trustee.

3rd. This court has no jurisdiction to hear and determine or settle the accounts of said Pearce, as guardian of defendant Mary B. Phelps.

4th. The exhibits filed with said bill show there was a large balance due her from said Pearce on his guardian account.

5. The bill and exhibits show that the account of said Pearce with complainants was fully paid and discharged by him, and defendants deny that he was authorized to pay the account contracted by said H. W. Vick, in his lifetime, or to make any promise or agreement
44 touching said accounts that would bind these defendants.

6. Because the said bill complaint does not set forth or show the nature or cause of the alleged indebtedness of the said H. W. Vick, nor the items of the said account said in said Exhibit F to have been rendered him, or rendered to said Pearce.

7. Because the account against said Vick was barred by the statute of limitations long before the bill was filed.

8. Because neither the said Vick nor said Pearce was authorized to create any debt that would be binding on said land or estate of defendant Mary B.

9. Because said bill does not show what property is sought to be made liable for said alleged claim.

10. Because complainants have a plain remedy at law.

11th. Because the said claim is an individual and legal liability of said Pearce, if it is a valid claim against anybody.

12. Because said bill is otherwise uncertain and insufficient; therefore, &c.

T. A. & M. MARSHALL,
Sol's for Def't.

45 And on the 21st day of Feb'y, 1871, interlocutory decree was made herein in the words & figures following, to wit:

STATE OF MISSISSIPPI,
Washington County:

In chancery, Feb'y term, A. D. 1871.

HEWETT, NORTON & CO.
vs. } 298.
A. J. PHELPS & WIFE.

This day came on to be heard the demurrer of defendants to the complainants' bill, and the complainants thereupon, in open court, confessed said demurrer as to the points made that Jona. Pearce, trustee, was not made party defendant, and that no itemized account had been filed by complainants, and asked leave to amend their bill by making said Pearce defendant, and to file an itemized account within thirty days, which is granted; and the court, being sufficiently advised as to
46 all other the points made in and by said demurrer, doth consider that the same are not well taken, and doth order, adjudge, and decree that as to them the said demurrer be, and the same is hereby, overruled.

Ordered, adjudged, and decreed this 21st day of February, A. D. 1871.

E. S. HARMON,
Chancellor.

And on the 20th day of March, 1871, itemized a/c, filed as Exhibit F, was filed herein in the words & figures following, to wit:

Dr., Mr. J. Pearce, trustee for the estate of Mrs. Sarah Vick, in account & interest account with Hewitt, Norton & Co., Cr.

1862.					
June 30.	To bal. as per a/c rend.....	10,377 81	1,555	3,585 85	
1866.					
Jan'y 9.	" cash p'd draft, fav'r S. P. Perkins.....	907 18	257	52 20	
March 31.	" " " over to J. Pearce for services as trustee.....	1,587 86	186	65 60	
Oct. 3rd.	" balance interest due as to date.....	2,722 28			
		15,594 83		3,703 65	

Cr. on next page.

47 CR.

1864.					
June 30.	By cash from R. Atkinson, paid him by H. C. Pindall, 16th May.....	4,076 10	825	747 28	
1866.					
Jan'y 5.	" p'r sales 20 B. cotton per Gray Eagle.....	3,887 57	271	234 09	
Oct. 3.	" balance interest, our favor..			2,722 28	
	" balance account due us down.	7,631 16			
		15,594 83		3,703 65	

1866.
Oct. 3. To balance a/c due us cash, 7,631.16.

Copy.—E. & O. E.

NEW ORLEANS, *Oct. 3d*, 1866.

STATE OF LOUISIANA,
City of New Orleans:

Before me, John G. Eustis, commissioner for Mississippi, personally appeared A. L. Stuart, who, being by me duly sworn, says he is the liquidator of the late firm of Hewitt, Norton & Co.; that the foregoing account, dated 3rd October, 1866, is a correct transcript taken from the books of the said late firm in his possession, and is a just claim against the estate of Mrs. Sarah Vick, of Mississippi, for the sum of seven
48 thousand six hundred and thirty-one $\frac{16}{100}$ dollars, exclusive of interest, from 3d October to the present time, and that all legal offsets, payments, & credits known to this affiant have been allowed.

[L. S.] J. G. EUSTIS, *Com'r.*

Subscribed & sworn to before me this 13th March, A. D. 1871.
A. L. STUART,
Liquidator for the late firm of Hewitt, Norton & Co., for Mississippi, in New Orleans.

49 And on the 23rd day of March, 1871, affidavit for publication was made herein in the words & figures following, to wit:

STATE OF MISSISSIPPI,
Washington County:

HEWITT, NORTON & CO.
vs.
A. J. PHELPS & WIFE ET AL. } 298. In chancery.

Personally appeared before me, clerk of the chancery court in & for said county, Wm. G. Yerger, solicitor for complainants in the above-entitled cause, who, being sworn, says that Jona. Pearce, one of the defendants in the foregoing bill, is a non-resident of this State, and that his place of residence & post-office address is Shelbyville, Kentucky; wherefore affidavit prays process of publication against said Pearce.
WM. G. YERGER,
Solicitor, &c.

Sworn to and subscribed before me this 23d day of March, A. D. 1871.
JOHN FAWN, *Clk,*
By JOHN DAVIES, *D. C.*

50 And on the 22 day of May, 1871, demurrer of defendants was filed herein in the words & figures following, to wit:

Demurrer.

STATE OF MI[illegible]SIPPI,
Wash[illegible]ington County:

In the chancery court of said county, at the term, 1871.

HEWITT, NORTON & CO.
vs.
A. J. PHELPS & WIFE ET ALS. } No. 298.

And the said defendants A. J. Phelps & Mary B., his wife, by protestation, &c., not admitting, &c., come and say that the said complainants have not made or stated such a case as entitles them to have or obtain the relief prayed for, nor any relief, discovery, or decree against these defendants, and they therefore demur to complainants' bill, and for cause of demurrer show:

1st. That the account purporting to be an itemized account of the indebtedness sued for and lately filed by complainants, in pursuance
51 of the orders this court rendered herein Feb'y 22d, 1871, is not a proper itemized account as required by law, and does not show the nature & items of said indebtedness as required by law.

2nd. That it appears from complainants' bill & exhibits, and from the account of said indebtedness filed by complainants, that said indebtedness, or a large portion thereof, was contracted before the said J. Pearce, trustee, against whom it was made out, had or attempted to exercise

any control over or authority to manage the affairs of said estate or to contract any such debt.

3d. That said J. Pearce, trustee, had no authority to bind said lands of said defendant, neither as trustee under the trust deed of Sarah Vick nor as guardian of her minor heirs or of the said Mary B. Phelps.

4th. That the alleged confirmation by said def't Mary B. Phelps,
52 and promise to pay said indebtedness, was alleged to have been made by her after attaining her majority, is not in writing.

5th. Because the account sued on was, as it now appears, barred by the statutes of limitations before the commencement of this suit.

6th. And because said bill is otherwise uncertain and insufficient, &c.

T. A. & M. MARSHALL,
Sol's for Def't.

53 And on the 22d day of May, 1871, proof of publication was filed herein in the words & figures following, to wit:

STATE OF MISSISSIPPI,
Washington County:

In chancery, to May term, 1871.

HEWETT, NORTON & CO.
vs. } 298.
A. J. PHELPS & WIFE ET AL.

It appearing to the court from affidavit filed herein that Jona. Pearce, one of the defendants in the foregoing cause, is a non-resident of this State, so that the ordinary process of law cannot be served upon him, and that his residence & post-office address is Shelbyville, in the State of Kentucky, it is therefore ordered that the said defendant Jona. Pearce do enter his appearance herein on or before the next term of the chancery court of Washington County, to be held in the town of Greenville, on the 4th Monday in May, 1871, then and there to
54 plead, answer, or demurr to complainants' bill filed herein, or the same will be taken for confessed as to him, and the several allegations thereof admitted to be true. It is further ordered that a copy of this order be published once a week for four weeks successively in the Greenville Republican, a public newspaper published in this county, and that a copy of this order be mailed, postage prepaid, to the said Jona. Pearce, at his post-office above named.

Ordered this 24th day of March, 1871.

JOHN FAWN, *Clerk.*
By JOHN DAVIES, *D. C.*

NUGENT & YERGER,
Sol's for Comp't.

55 *Proof of publication.*

THE STATE OF MISSISSIPPI,
Washington County:

John W. Ward, manager of the Greenville Republican, a weekly newspaper printed and published in the town of Greenville, county of Washington, State of Mississippi, certify that the notice of which the annexed is a copy was published in said newspaper once a week for four weeks successively, in the numbers and dates following:

In No. 25 of volumes 2, of date March 25, 1871.
In No. 26 of volumes 2, of date Ap'l 1st, 1871.
In No. 27 of volumes 2, of date Ap'l 8th, 1871.
In No. 28 of volumes 2, of date Ap'l 15th, 1871.
In No. 29 of volumes 2, of date Ap'l 22d, 1871.

JOHN W. WARD,
Manager Greenville Republican.

Printer's fee, $15.00; paid.

I, John Fawn, clerk of the chancery court in and for said county and State, hereby certify that I have examined the several num-
56 bers of the newspapers mentioned above, and find the publication was made as stated in the above affidavit.

Witness my hand and official seal this 20th day of May, 1871.

[L. S.] JOHN FAWN, *Clerk.*
By JOHN DAVIES, *D. C.*

STATE OF MISSISSIPPI,
Washington County:

I, John Fawn, clerk of the chancery court in and for said county, hereby certify that a copy of the order attached to the within proof of publication was by me duly mailed, postage prepaid, to the said Jona. Pearce, at Shelbyville, Kentucky, on the 31st day of March, 1876.

Given under my hand & official seal this May 22d, 1871.

[L. S.] * * * *

And on the 23rd day of May an order was made herein in the words & figures following, to wit:

57 HEWITT, NORTON & Co. } }
vs. } #298.
A. J. PHELPS & WIFE ET AL. } }

On this day, this cause coming on to be heard upon complainants' original bill of complaint & exhibits, and the amendment to the said bill, and the amended bill of particulars or itemized account, filed as exhibits thereto, and upon the demurrer of said defendants A. J. Phelps & Mary B. Phelps, his wife, to said amended bill and exhibits filed herein, by leave of this court first granted, on motion of complainants' solicitors, and by consent of counsel for the parties, it is hereby ordered that this cause do stand continued until the next term of this court.

Ordered, adjudged, & decreed this 23rd day of May, A. D. 1871.

58 And on the 18th day of December, 1871, this cause was continued and entered on the minutes of this court in the words and figures following, to wit:

HEWETT, NORTON & Co. } }
vs. } #298.
A. J. PHELPS & WIFE. } }

Continued.

And on the 22 day of April, 1872, motion to strike demurrer from file was filed herein in the words & figures following, to wit:

STATE OF MISSISSIPPI,
Washington County:

Chancery court, April term, 1872.

HEWETT, NORTON & CO.
vs. } 298.
A. J. PHELPS & WIFE.

Complainants, by their solicitors, move the court to strike from the files demurrer of defendants filed March 22d, 1871, because the same is improvidently filed, and for a decree pro confesso against the
59 said defendants A. J. Phelps and Mary B. Phelps, his wife.

PERCY & YERGER,
Sol's for Comp't.

60 And on the 23d day of April, 1872, order granting appeal on demurrer filed herein the words & figures following, to wit:

HEWETT, NORTON & CO.
vs. } 298.
A. J. PHELPS & WIFE.

This day the motion of complainants to strike from the files the demurrer of defendants filed May 22d, 1871, coming on to be heard, and the court being then of sufficiently advised, doth order, adjudge, and decree that said motion be, and the same is hereby, sustained; and it is further ordered by the court that an appeal be, and is hereby, granted to the said defendants upon their entering into bond in the sum of five hundred dollars, which said bond shall be payable and conditioned according to law, and that said bond be given within ninety days from this day.

And on the 26 day of April, 1872, appeal bond wa sfiled herein
61 in the words and figures following, to wit:

Know all men by these presents that we, A. J. Phelps & Mary B. Phelps, his wife, principals, & W. A. Pollock and Wm. G. Phelps, surety, are held and firmly bound unto Hewett, Norton & Co. in the sum of five hundred dollars, for the payment of which well and truly to be made we bind ourselves, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 25th day of April, A. D. 1872. The condition of the above obligation is such that whereas the above-bound A. J. Phelps & Mary B. Phelps have prayed and obtained an appeal to the supreme court of the State of Mississippi from the decree in the court of chancery of Washington County, of the State of Mississippi, rendered at the April term thereof, A. D. 1872, in the suit between said Hewett, Norton & Co.,
62 complainants, and said A. J. Phelps & Mary B. Phelps, defendants, by which decree the demurrer of said defendants filed May 22d, 1871, to the amended bill of complainants was stricken from the files, and from the decree of said court overruling sundry causes of demurrer set forth in the original demurrer of said defendants: Now, should the said decrees be affirmed, then if the said A. J. Phelps & Mary B. Phelps shall pay, satisfy, and perform the decree or final

order of said court of chancery, then this obligation to be void, or else be & remain in full force and virtue.

A. J. PHELPS, [SEAL.]
MARY B. PHELPS, [SEAL.]
By WM. G. PHELPS, *Agent.*
W. A. POLLOCK. [SEAL.]
W. G. PHELPS. [SEAL.]

Signed, sealed, & delivered in presence of—

63 THE STATE OF MISSISSIPPI,
Washington County:

Personally appeared before me, O. Winslow, clerk, &c., the above-named sureties, who, upon oath, state that they are each worth the said sum of five hundred dollars, subject to levy, over and above legal exemption.

W. A. POLLOCK.
WM. G. PHELPS.

Sworn to & subscribed before me this 26 day of April, A. D. 1872.
O. WINSLOW, *Clerk,*
By C. McGRATH, *D. C.*

And on the 7th day of Sept., 1872, citation in error was issued herein in the words & figures following, to wit:

THE STATE OF MISSISSIPPI,
Washington County:

To the sheriff of Washington County, greeting:

You are hereby commanded to summon M. O. H. Norton, R. A. Atkinson, and Arthur L. Stewart, surviving partners of the firm
64 of Hewitt, Norton and Co., and Percy & Yerger, that they be and appear before the supreme court on the 3d Monday of October next, to answer a writ of error taken out by A. J. Phelps & wife to reverse a decree in the chancery court of Washington County, of said State, at the April term thereof, A. D. 1872, in a certain suit wherein Hewitt, Norton & Co., complainants, and A. J. Phelps & wife, defendants. Herein fail not, and have then and there this writ.

Witness the honorable E. G. Peyton, chief justice of the supreme court, the 3d Monday of April, A. D. 1872, and seal of said chancery court. Issued the day 7th of Sept'r, A. D. 1872.

O. WINSLOW,
Clerk of the Chancery Court of Washington Co.,
By C. McGRATH, *D. C.*

Endorsed on the foregoing writ is the return of the sheriff in the words & figures following, to wit:

Rec. Sept. 7, 1872.

L. F. WEBBER, *Sheriff,*
By W. H. SMITH, *D. Sh'ff.*

65 Executed the within process this day upon the within-named Percy & Yerger, in person, by handing to them a true copy thereof, this 11th day of Sept., A. D. 1872.

L. F. WEBBER,
Sh'ff Washington County,
By W. A. CLARY,
D. Sh'ff.

Further returned the within-named M. O. H. Norton, R. A. Atkinson, and Arthur L. Stewart not found in my county after diligent search.

This Sept. 11th, 1872.

L. F. WEBBER, *Sh'ff.*
By W. A. CLARY, *D. Sh'ff.*

And on the 22d day of Jan'y, 1873, mandate was filed herein in the words & figures following, to wit:

The State of Mississippi to the honorable the chancery court of Washington County, greeting:

66 Whereas on the 13th day of January, 1873, the same being a day of a regular term of our supreme court, begun and held in the court-room, in the capitol, in the city of Jackson, in said State, on 3d Monday of October, in the year of our Lord 1872, the following final decree was rendered by our said supreme court, to wit:

A. J. PHELPS AND MARY B. PHELPS
vs.
HEWETT, NORTON AND CO.

This cause having been submitted, on a former day of this term, upon the record herein from the chancery court of Washington County, and this court having sufficiently examined and considered the same, and being of opinion that this court has no appellate jurisdiction herein,

67 doth order that the appeal taken to the decree of the chancery court of Washington County rendered in this cause at the April term, A. D. 1872, be, and the same is hereby, dismissed. And it is further considered & so ordered, adjudged, and decreed by this court that the appellees do have and recover of the appellants and W. A. Pollock and W. G. Phelps, surety in the writ of error bonds, the costs of this cause in this court expended, &c., to be taxed, &c. You are therefore hereby commanded that such execution and further proceedings be had in such cause as according to right and justice, the judgment of our said supreme court, and the law of the land ought to be had.

Witness the Hon. E. G. Peyton, chief justice of our supreme court, also the signature of the clerk and the seal of said court hereunto affixed, at office, at Jackson, this the 14th day of January, 1873.

[L. S.] J. M. MCKEE, *Clerk.*

68 And on the 28 day of January, 1873, leave granted defendants herein and entered on the minutes of said court in the words & figures following, to wit:

HEWETT, NORTON & CO.
vs. 298.
A. J. PHELPS & WIFE.

Leave given defendants sixty days to answer.

69 And on the 11th day of March, 1873, answer of defendants was filed herein in the words & figures following, to wit:

In chancery, to Jan'y term, 1873.

HEWETT, NORTON & CO., COMP'TS,
vs.
A. J. PHELPS ET AL., DEF'TS.

The joint and several answers of Mary B. Phelps and A. J. Phelps, her husband, to the bill of complaint exhibited against them & Jonathan Pearce, codefendant, in this court, by Hewett, Norton & Co.:

Respondents, saving and reserving all benefit of exception to the many imperfections and insufficiencies in said bill of complaint, for answer thereto, or to so much thereof as they are advised is material for them to answer, answering say: They admit that said Mary B. is the sole surviving heir at law & distributee of Sarah Vick, deceased, but say they cannot either admit or deny that at the time of filing of said
70 bill she was in possession of the property said in said bill to thereinafter mentioned, because no property is thereinafter described. They admit the execution of the trust deed by Sarah Vick & H. W. Vick, her husband, as stated in the bill, but deny that at the filing of the bill they were in possession of all of the real and personal property therein described, but admit that they are in possession of certain portions thereof, among which is the share of said Mary B. of the said property in the city of Louisville, and also the plantation in Washington County, the wild lands in Issaquena Co., as mentioned; and defendants admit that said property was conveyed in trust for certain purposes, but do not admit that the purposes, objects, and conditions as set forth in the bill are correctly stated, but refer to the said trust deed for a full understanding thereof. They admit the
71 death of Henry W. Vick, and that after his death Jonathan Pearce took possession of said property, or so much thereof as there remained undisposed of. They admit that the said trust estate was at the time*d* claimed to be heavily embarrassed with debts, but say that they are informed and believe and say that such debts were debts created since the death of Sarah Vick, for which the said trust estate was in nowise liable. And they admit that said Pearce did assume to exercise management and control of the said estate, but deny that he was in any way authorized thereto by the said trust deed. They admit that he was appointed by the probate court of Washington County as guardian of respondent Mary B., who was then unmarried and about nineteen years of age; they admit that said Pearce accounted to said probate court for the matters of guardianship, but deny that he did legally account
72 to said court for his actings & doings, as such trustee and respondents deny that the probate court had any jurisdiction of said trust matter. They admit that said Pearce did render his final account to said probate court of said guardianship, by which it appeared that he was indebted to the said trust estate in the sum of $2,768.53 They admit that said Pearce filed a report along with his said account, in which he refers to an account current of complainants claiming a large balance due them of $10,377.81, but show a credit on that balance of 4,076.10. Respondents do not admit, but deny, that there was at that time, or at the filing of said bill, any indebtedness whatever to the said complainants for which the said trust property could be charged by complainants. Respondents deny that shortly after the ren-
73 dering of said final account the said Pearce did execute or deliver to said Mary B. a deed conveying all of the property in the county of Washington embraced in the deed of trust aforesaid, or any

part thereof. They admit that shortly thereafter said respondents did take possession of the plantation and certain other portions of said trust property in Washington County, and all of said wild lands in Issaquena County, but that all of the said slaves, and much of the residue of said personal property, was destroyed by the war, and never came into her possession. Respondents deny that the said Mary B. did, after she became of age, and prior to her intermarriage, and after a proper examination, and with a full knowledge of the matters stated in said final account, and especially of said supposed indebtedness to said complainants, ratify, agree to, or accept the same. The re-
74 spondent Mary B. denies that she ever did, at any time until the filing of the amended bill of particulars to complainants' bill, know of what the said supposed indebtedness consisted, or that she ever did ratify, confirm, or promise to pay the same, and she denies that she owes the complainants any sum whatever, or that her property is liable therefor; and in the event that the same is held to be a charge upon the said trust estate the respondents require strict proof of each and every item of said bill of particulars. Respondents deny that any such payments as alleged to have been made by complainants to said Perkins or to said Pearce constitute any charge upon said trust estate, but say that said drafts were drawn on and paid by proceeds of 20 bales of cotton in complainants' hands, as stated in said bill. Re-
75 spondents say that if it be true, and they do not admit, but deny, and require strict proof of the fact, that the complainants did, on the 3rd day of October, 1866, render to the said Pearce an account current of that date, showing a balance due complainants of $7,631.16 and that said account was admitted by said Pearce to be correct, and due, and owing, proof of which is required, said supposed admission in no way binds or affects the rights or property of respondent Mary B.; that his powers as guardian, as well as trustee, in every respect ceased after majority of Mary B., which, respondents say occur'ed long before such alleged admission; and respondents say that said Pearce had no authority to settle the whole or any such part of the account of H. W. Vick. Respondents deny that after due examination to said Mary B. at any time admitted the said account correct, or ever undertook
76 or promised to pay the same, and they deny that they admitted the same to be a legal and proper charge against them, or that the same was a liability for which the said trust estate was bound. Respondents say that they have no personal knowledge, and are, therefore, not prepared to admit, but, on information, deny, that the said account was contracted for supplies or money advanced by complainants to said trustees, Vick and Pearce, for the support and maintainance of said plantation in the county of Washington, and of the said Henry W. Vick & Mary B. Phelps, or that the same was in strict accordance with the tenor & terms of the said deed of trust, and they call for strict proof thereof; and respondents say if there be anything at all due upon said account to said complainants it is due from said H. W. Vick and Jonathan Pearce. Respondents further deny that the said trust
77 property stands charged, by virtue of said deed of trust, with the payment of said supposed indebtedness, and deny that it is bound and liable therefor in the hands of respondents. They deny that respondent Mary B., after she became of age, did in fact accept of the deed of reconveyance from said Pearce, as aver'ed in said bill. The respondents deny that the said Pearce had any authority to manage or control the said trust estate, or to charge the same with debts as trustee, by virtue of anything contained in said trust deed, nor that his

powers as guardian of the said Mary B. would authorize him to charge the said estate with debts, either by his admission or otherwise, or that he attempted or intended to do so in fact. The respondents deny that the said Vick did in fact charge, or intend to
78 charge, the said estate with any part of said indebtedness that may have been contracted by him; and they say that the same and the whole thereof was contracted by complainants solely in *in* the responsibility of the said H. W. Vick and Jonathan Pearce, and under the expectation that the crops there to be produced by them on said estate would be shipped to them in payment therefor; and they say that the crops so produced were amply sufficient to pay the said indebtedness, and would have been so shipped to said complainants in payment as aforesaid, but that the said complainants, so relying upon the said crops of cotton as their sole security for said payment by the trustee aforesaid, did take charge of and treat the said cotton as their own, and as delivered to them in payment as aforesaid by consent and concurrence of said Pearce, then acting as trustee in possession thereof; and
79 so dealing with said cotton complainants instructed to be kept and stored on the plantation aforesaid, and by reason thereof, the said cotton, to a large amount in excess of such indebtedness, was destroyed by the authorities of the Confederate Government, and the respondents say that they have never received any part or the value of any part of the cotton so relied upon as aforesaid for the payment aforesaid, but that the same was wholly lost by the acceptance, possession, control, and instruction of said complainants as aforesaid. The respondents further say that so much of said account as is shown to consist of supplies for the use & sustenance of the slaves upon said plantation in the support and maint*ai*nance of said trust estate, but a greater of any and all such supplies, was intended for and was applied to the use and support of slaves in the possession of said H. W. Vick &
80 Jonathan Pearce, wholly distinct from the said trust estate so set forth by complainants, and constituting no part thereof. The respondents, further answering, say that heretofore, to wit, in the year A. D. 1859, 1860, 1861, or 1862, Henry C. Pindle, duly qualified and acting executor of the estate of H. G. Vick, then deceased, did to the complainants, at New Orleans, Louisiana, then and there doing business as cotton-factors and commission merchants of him the said H. C. Pindle, executor &c., a large quantity of cotton, the exact amount of which is unknown to respondents or said Pindell, but which they believe is known to the complainants and can be made to appear from the books then kept by said firm, and the letter and bills of lading sent them by said Pindell or his agent, and the retained copies, if any, that were kept of letters sent in reply by them. The said shipment of cotton
81 was made under and in pursuance of the usual business arrangements between commission merchant and planters, theretofore made with complainants by said Pindell, to consign & ship the crops raised on the plantation of said H. G. Vick to said complainant, and, as respondents believe & state, with notice to said complainants; that it was the duty of said complainants, and in law they were bound, to procure a full & sufficient insurance upon such cotton, according to the custom of merchants in such matters, but by reason of the default and negligence of the said complainants, as the respondents are informed and believed, they failed and refused to procure the insurance aforesaid, and respondents say that they are informed and believe that the said cotton was lost and destroyed on its way, & consigned to the complainants at the city of New Orleans, as aforesaid, in such a manner and form

82 as would have legally entitled the said Pindell, as executor, to full payment and indemnity therefor had the same been duly insured as aforesaid; and by reason of the default and negligence of complainants aforesaid the said Pindell, as executor, suffered damage to the full value of the cotton so shipped. Afterwards, and before the commencement of this suit, to wit, on the 1st day of May, A. D. 1866, the said Pindell, as executor aforesaid, duly assigned all his right to said damages to respondent Mary B., by instrument in writing filed herewith and marked Exhibit 1, and prayed to be made part of this cross-bill; and respondents say that the complainants are insolvent, and for that reason they can only avail themselves of any benefit accruing to them from such claim and assignment as aforesaid by having the same set off against any sum which might be adjudged against them by this honorable court.

To the end therefore that the said complainants may full & true
83 & perfect answer make upon them oaths to all & singular the allegations herein made, and full discovery make of all correspondence between them and the said Pindell, executor, or his agents, in anywise appertaining to the matter of said claim, and that they may give true copies of any and all letters, bills, or other documents relating thereto, and true discovery make of the quantity and value of said cotton, and the time and manner of its shipment and circumstances of its loss, respondents pray that this their answer may be made a cross-bill, and that the said complainants may each and every of them be made defendants hereto, and required to answer so much thereof as relates to said shipment of cotton by said H. C. Pindell, and the loss thereof, on their several corporal oaths, as fully as if specially interrogated, and true, full, and complete discovery make of all letters,
84 bills of lading, notices of shipment or loss of said cotton, and of the time of its shipment, the number of bales, weight, and value of said cotton, and generally all writing entries on their books or documents & any sort relating thereto, which they may have received, made, or have in their possession, & of any and all facts relating thereto, or tending to throw light upon said transaction. Respondents pray for subpœna, &c. directed, &c., commanding, &c.; and as in duty bound, &c.

A. J. PHELPS.
M. B. PHELPS.

STATE OF KENTUCKY,
Jefferson County, ss:

Personally appeared before me, the undersigned, a commissioner duly commissioned by the governor of the State of Mississippi to take acknowledgment and proof of deeds and other legal documents
85 to be used in the State of Mississippi, residing in the city of Louisville, county of Jefferson aforesaid, and qualified according to law, the above-named A. J. Phelps and Mary B., his wife, who, being duly sworn, say that the facts stated in the foregoing answer and cross-bill in chancery as of their own knowledge are true and those stated on information or belief they verily believe to be true.

Given under my hand and official seal, at the city of Louisville, county of Jefferson, this 27th day of February, A. D. 1873.

[L. S.] N. R. WILSON,
Commissioner for Mississippi in Louisville, Kentucky.

Exhibit 1 to foregoing answer and cross-bill is in the words & figures following, to wit:

LOUISVILLE, *May 1st*, 1866.

I assign and transfer to Mrs. Mary B. Phelps, sole surviving
86 residuary legatee of the estate of H. G. Vick, dec'd, any claim said estate may have against the Messrs. Hewett, Norton & Co., of New Orleans, for a shipment of cotton lost and not insured by reason of the negligence of said house.

H. C. PINDELL,
Ex'r of H. G. Vick, dec'd.

And on the 28th day of October, 1873, order continuing, &c., was filed herein in the words & figures following, to wit:

HEWETT, NORTON & CO.
vs. } 298.
A. J. PHELPS & WIFE.

Ordered by the court that this cause be continued, with leave to complainants to answer defendants' cross-bill on or before the first day of the next term of this court.

87 And on the 26th day of Jan'y, 1874, answer of complainants to cross-bill was filed herein in the words & figures following, to wit:

STATE OF MISSISSIPPI,
Washington County:

Chancery court, Jan'y term, 1874.

HEWETT, NORTON & CO.
vs.
A. J. PHELPS & WIFE ET AL.

The answer of said complainants to cross-bill of defendants A. J. Phelps and Mary B. Phelps:

These respondents, reserving exceptions to the many errors and uncertainties in said cross-bill contained, for answer thereto, or to so much thereof as they are advised it is material for them to answer, say: Respondents deny that said Henry W. Vick, deceased, did not in fact charge, and did not intend to charge, said estate with
88 the indebtedness specified in said original bill, or that said indebtedness was contracted by said complainants solely or at all on the individual responsibility of said H. W. Vick and Jonathan Pearce, and under the expectation that the crops produced by them on said estate would be shipped in payment therefor. Respondents did expect the shipment of said crops, and that the same, after furnishing the necessary yearly supplies, would, from year to year, be applied in payment of the running account, and such was in fact done. Respondents say that the crops produced may have been amply sufficient to pay said indebtedness, because they do not and cannot know how much was actually produced, but they em-
89 phatically and positively deny that the crops which came to their possession were sufficient for that purpose; on the contrary, in their account current, filed with the papers in this cause, respondents have given to defendant' credit for every dollar to which they are entitled and which said crops produced, & it leaves defendants still indebted to respondents in the amount stated in said account current.

Respondents deny that they ever relied upon said crops as their only

security; they deny that they took charge of and treated said cotton as their own and as delivered to them in payment of any party said indebtedness by consent & concurrence of said Pearce, and that so dealing with said cotton they instructed it to be kept and stored on said plantation, and that by reason thereof said cotton was de-
90 stroyed by the authorities of the Confederate Government.

Respondents deny that said cotton was wholly or in any part lost by the acceptance, possession, control, and instruction of respondents.

Respondents deny that any portion of the supplies furnished by them upon the account filed herein was intended for or was applied to the use and support of slaves in the possession of the said H. W. Vick & Jno. Pearce, distinct from said trust estate. Respondents deny that to their knowledge was any total loss of (42) forty-two bales or any other number of bales cotton shipped to them for account of H. W. Vick or H. C. Pindall, trustee, and that they were responsible for such loss, if any there was; but they admit that a certain lot of (42) forty-two bales cotton was received for account of H. C. Pindall, trustee, in March, 1861, as appears by account sales marked A and hereunto
91 attached, twenty-three bales of which was badly damaged and sold at auction, but respondents deny that they are in any manner responsible for said loss or damage, and aver that said cotton was shipped on a non-insurable water-craft, and that their open policy of insurance covered only such shipments as were put on good and seaworthy steamboats and such other river-crafts as might be approved by the New Orleans Board of Underwriters. The business engagements of commission merchants are of the most varied & diverse description, & respondents cannot tell to what arrangements defendants refer under the description of "usual business arrangements," but suppose from the general tenor of said cross-bill that defendants mean to allege that at the date of said shipment it was duty of re-
92 spondents, according to the general usage & custom of merchants, to have insured said cotton. Respondents emphatically deny such to have been the general usage or custom, or that it applied in this instance. Respondents deny receiving any notice that said shipment had been made, or having any knowledge of the same until said loss occurred. Respondents deny that the failure to procure or have insurance or shipment of cotton was due to any default or negligence upon their part, or that said Pindall suffered any damage by reason of their said default. Respondents know nothing of said Pindall' qualifications as said executor, or of said assignment of his said pretended claim, and, if to be affected thereby, call for strict proof. Respondents herewith file copies of such documents relating thereto as are in existence, or as they are able to find after diligent search. Respond-
93 ents are unable to state the value of any cotton totally lost, if any such there was, never having seen it, but represent by Exhibits A & B the value of all cotton they receive'.

Respondents deny that they do now or ever did owe to said Pindall, as executor as aforesaid, or to any other person, any sum of money whatever on account of the loss of said cotton, or that they were on any way legally or equitably liable for the same; and respondents further answer that, as conformatory of their action on all these matters to which exception is now taken by defendants, in May, 1862, Pindall, trustee, paid them, through their branch home in Louisville, a considerable sum in part liquidation of the then existing indebtedness, and that 1866 Phelps & wife made respondents a shipment of cot-

94 ton in still further reduction of the debt, and applied to them to continue to act as their factors and make advances to carry on and work the plantation. And now having fully answered, &c.

PERSY & YERGER,
Sol's for Complainants.

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans, ss:

Personally appeared before a commissioner for the State of Mississippi, resident in the city of New Orleans aforesaid, Arthur L. Stewart, one of the respondents, who states on oath that the allegations and statements of the foregoing answer are true and correct.

ARTHUR L. STEWART,
For Hewitt, Norton & Co., in Liquidation.

Sworn to and subscribed before me, this 21st day of Jan'y, 1874.
[L. S.] ALFRED INGRAHAM,
Com'r of State of Miss.

95 Exhibit A to foregoing answer is in the words & figures following, to wit:

Sales by Hewitt, Norton & Co. to 49 bales cotton, per Natchez, March 8th, 1861, for account of K. W. Vick, esq.

1861, April 18; sold A. B. Cammack, esq'r:		
H. W. Vick, 49 bales, weighing 2,263, @ 9c		2,037 87
CHARGES.		
Freight & charges, p'r. B. L.	79 63	
Drayage, storage, labor, and weighing	24 50	
River insurance on $2,450, ½%	12 25	
Fire insurance " 2,038c., 1%	20 38	
Commission on sales, 2½%	50 94	187 70
Net proceeds		1,850 17

E. & O. E., New Orleans, April 19th, 1861.

96 EXHIBIT B.

Sales by Hewitt, Norton & Co. of 42 bales cotton. Ex. Enna Belt, March 12th, 1861, for account of Mr. Henry Prendall, trustee.

1861, March 20, Fernandez & Atram, at auction:

Vickland, 23 bales cotton, damaged, @ $14.00	322 00	
Less advertizing & commission	11 05	
		310 95

April 18, sold to A. B. Cammach:

Vickland,	#327,	409;	#324,	402;	
	354,	412;	359,	412;	
	338,	445;	326,	397;	
	346,	422;	340,	398;	
	339,	432;	345,	397;	
	355,	443;	331,	387;	
	328,	414;	323,	427;	
	341,	399;	344,	405;	
	337,	420;	329,	466;	
	343,	400;			
	4,191		3,691		

3,691 = 7,882 lb., @ 9 ..... 709 38

1,020 33

CHARGES.

Freight & salvage	378 00	
Insurance against fire	7 65	
Drayage, storage, labor, weighing	9 50	
Bagging & rope & repairing 5 bales	4 70	
Commissions on sales, 2½ %	25 50	
		425 39
Net proceeds		$594 98

E. & O. E., New Orleans, April 19th, 1861.

97 And on the 27th day of January, 1874, motion to strike answer from files was filed herein, in the words & figures following, to wit:

THE STATE OF MISSISSIPPI,
Washington County:

In chancery court of s'd county, Jan'y term, A. D. 1874.

HEWITT, NORTON & CO.
vs. } 298.
A. J. PHELPS ET MS., DEF'TS.

The said defendants, by their solicitors, now move the court that the answer of the said complainants filed herein to the cross-bill of the said defendants be stricken from the files of this court and for reason state that the same is—

1st. Irregular and insufficient and

2nd. That the same is not the answer of all the complainants herein and defendants to said cross-bill, but only the irregular answer of said Stewart.

T. A. & M. MARSHALL, &
W. G. PHELPS,
Sol's for Defendants.

98 And on the 27th day of January, 1874, order overruling motion to strike answer from files was filed herein in the words & figures following, to wit:

STATE OF MISSISSIPPI,
Washington County:

In chancery court, January term, 1874.

HEWITT, NORTON & CO.
vs. } 298.
A. J. PHELPS & WIFE.

This day the motion of defendants to strike from the file the answer of complainants to the cross-bill of the said defendants herein coming on to be heard, and the court being now thereof sufficiently advised, doth order, adjudge, and decree that said motion be, and the same is hereby, overruled; to which the said defendants excepted.

99 And on the 4th day of May, 1874, this cause was continued

and the same was entered on the minutes of said court in the words & figures following, to wit:

HEWITT, NORTON & CO.
vs. } 298.
A. J. PHELPS & WIFE.

Continued.

And on the 27th day of July, 1874, this cause was continued, and entered on the minutes of said court in the words & figures following, to wit:

HEWITT, NORTON & CO.
vs. } 298.
A. J. PHELPS & WIFE.

Continued by consent.

100 And on the 26th day of October, 1874, this cause was set for hearing, & entered on the issue-docket of said cause in the words & figures following, to wit:

HEWITT, NORTON & CO.
vs. } 298. October term, 1874.
A. J. PHELPS & WIFE.

Set for hearing.

And on the 2d day of November, 1874, order to insert description, &c., was filed herein in the words & figures following, to wit:

HEWITT, NORTON & CO.
vs.
A. J. PHELPS & WIFE.

By consent of counsel for defendant', given in open court, & upon application of counsel for complainants, it is ordered that complainants be allowed to insert on the margin of their original bill a description of the land referred to in the original bill against which
101 a decree is sought.

And on the 2d day of November, 1874, pro confesso as to Pearce was filed herein in the words & figures following, to wit:

HEWITT, NORTON & CO.
vs.
A. J. PHELPS & WIFE.

It appearing to the court from the affidavits of complainants that one of the defendants, Jonathan Pearce, is a non-resident of this State, and that publication has been duly made requiring said defendant to plead answer or demur, and that proof of said publication is duly filed herein, and that said defendants has f'iled to plead answer or demur, it is therefore ordered that all of the allegations of complainants' bill be taken & held as confessed as to said defendant Jonathan Pearce.

102 And on the 7th day of November, 1874, final decree was filed herein in the words & figures following, to wit:

HEWITT, NORTON & CO., COMP'S,
vs. } 298.
A. J. PHELPS & WIFE, DEF'TS.

In chancery court for Washington County, Miss., to October term, 1874.

Be it remembered that this cause having been called heretofore, and the objection to the testimony filed by the complainants herein having been reserved for a decision upon final hearing, and the said cause coming on this day for final hearing, and upon full examination of the cause on the bill, answer, & proof submitted, and the argument of counsel and authorities cited, the court is of opinion that the complainants have not made out such a case as will entitle them to
103 the relief sought as against A. J. Phelps and Mary B. Phelps, the said defendants herein, on the said described trust property held by & for them, and a decree being asked for or desired by complainants against the said Jona. Pearce, defendant, it is therefore ordered, adjudged, and decreed that the said bill of complaint be dismissed as complainants' costs, and the said defendants go hense without delay. Ordered, adjudged, and decreed this 7th day of November, A. D. 1874.

E. STAFFORD,
Chancellor.

And on the 20th day of March, 1877, appeal bond was filed herein in the words & figures following, to wit:

THE STATE OF MISSISSIPPI,
Washington County:

Know all men by these presents that we, A. L. Stewart & A.
104 J. Aiken, are held and firmly bound unto A. J. Phelps, Mary B. Phelps, & Jona. Pearce in the sum of one hundred dollars for the payment of which well and truly to be made we bind ourselves, our heirs, executors, & administrators, firmly by these presents. Signed & sealed with our seals, and dated this 24th day of March, A. D. 1876.

The condition of the above obligation is such that whereas the above bound has prayed and obtained an appeal to the supreme court from the final decree rendered in the court of chancery of Washington County, of the State of Mississippi, at the October term thereof, A. D. 1864, in the suit between Hewitt, Norton & Co., complainants, and said A. J. Phelps, Mary B. Phelps, & Jona. Pearce, defendants: Now, should
105 the said decree be affirmed, then if the said shall pay, satisfy, & perform the decree or final order of said court of chancery, then this obligation to be void, or else to be and remain in full force & virtue.

A. L. STUART. [SEAL.]
A. J. AIKEN. [SEAL.]

Signed, sealed, and delivered in the presence of—
A. J. ARMSTRONG,
J. G. EUSTIS.

I approve this bond this 30th day of March. 1876.

A. W. SHADD, *Clerk.*

STATE OF LOUISIANA,
Parish of New Orleans, City of New Orleans, ss:

On this 24th day of March, A. D. 1874, before me, the undersigned commissioner for Mississippi, residing in New Orleans, personally came & appeared A. L. Stuart and Andrew J. Aiken, personally known to me to be the individuals described in and who executed the fore-
106 going bond, and severally acknowledged that they signed, sealed, and delivered the same, on the day & year therein named, as their voluntary act & deed for the uses & purposes therein expressed; and the said Andrew J. Aiken, being by me duly sworn, deposes and says that he is worth the sum of one hundred dollars, over and above his just debts, in property in the State of Mississippi. In witness whereof I have hereunto set my hand and official seal the day and year aforesaid.

[L. S.] J. G. EUSTIS,
Commission' for Mississippi in New Orleans.

And on the 7th day of June, 1877, mandate was filed herein in the words & figures following, to wit:

The State of Mississippi to the honorable the chancery court of
107 Washington County, greeting:

Whereas on the 21 day of May, 1877, the same being a day of the regular term of our supreme court, begun and held in the court-room, in the capitol, in the city of Jackson, in said State, on the third Monday of April, in the year of our Lord 1877, the following final decree was rendered by our supreme court, to wit:

M. O. H. NORTON ET AL. *vs.* A. J. PHELPS ET AL. } No. 2431.

This cause having been submitted, on a former day of this term, upon the record herein from the chancery court of Washington County, and this court having sufficiently examined and considered the same, and being of opinion that there is error therein, doth order, adjudge,
108 & decree that the decree of said court rendered in this cause dismissing the bill be, and the same is hereby, reversed, and cause remanded for an account to be taken in accordance with the views contained in the opinion rendered herein; and it is further considered, and so ordered, adjudged, and decreed, by this court, that the appellants do have and recover of the appellees the costs of this same in this court expended, &c., to be taxed, &c.

You are, therefore, hereby commanded that such execution and further proceedings be had in said cause as according to right and justice, the judgment of our said supreme court, and the law of the land ought to be had.

Witness the honorable H. F. Simrall, chief justice of the supreme court, also the signature of the clerk and the seal of the said court, at the office, at Jackson, this the 31st day of May, 1877.

[L. S.] A. W. LITTLE, *Clerk.*

109 And on the 7th day of June, A. D. 1877, petition for removal was filed herein, in the words and figures following, to wit:

110 THE STATE OF MISSISSIPPI,
Washington County:

In chancery court of said county.

HEWETT, NORTON & CO., COMP'TS,
vs.
A. J. PHELPS & WIFE ET AL., DEF'TS. } No. 298.

To the honorable Charles Clark, chancellor of the 4th district, sitting in & for the said county & State:

The petition of A. J. Phelps and Mary B. Phelps, his wife, would respectfully show unto your honor that on the 17th day of April, A. D. 1869, M. O. H. Norton, R. Atkinson, and Arthur L. Stewart, the complainants in the above cause, filed their bill therein in this honorable court against your petitioner, and afterwards, by amendment, against Jonathan Pearce, defendant, for the relief therein prayed for, and the said cause proceeded to a final decree made in said cause on the 7th day of November, 1871, whereby the said bill of complaint was wholly dismissed, and the said complainants adjudged to pay the costs of suit.

That afterwards, to wit, on the day of , A. D. 1876, the
111 said complainants prosecuted an appeal from the said decree to the supreme court of the State to revise said decree, and upon the hearing thereof, at the April term, A. D. 1877, of said court, to wit, on the 21st day of May, 1877, the said supreme court reversed the said decree and remanded the said cause to this honorable court for further proceedings, and the mandate therefor from said supreme court was filed in this court on the 7th day of June, A. D. 1877. Your petitioners respectfully show that at the time the said bill of complaint was filed, viz, the commencement of said suit, the said complainants M. O. Norton and A. L. Stewart were, and ever afterwards continued to be, and still are, citizens of the State of Louisiana, and the said R. Atkinson, comp't, then was, and ever afterwards continued to be, and still is, a citizen of the State of New York; and your petitioner, A. J. Phelps and Mary B. Phelps, defendants, were, at the time said suit was commenced
112 as aforesaid, and have ever since continued to be, and still are, citizens of the State of Kentucky; and the said Pearce, when he was made a party thereto, had become a citizen, and has so remained a citizen, of the State of Kentucky.

Your petitioners further show that the said controversy is a suit of civil nature in equity, wholly between citizens of different States, and can be fully determined, as between the parties thereto, in the courts of the United States, and that the matter in dispute exceeds, exclusive of costs, the sum of five thousand dollars.

Your petitioners state that the present term is the first term of this honorable court at which this application could be made to avail themselves of the act of Congress passed March 3d, 1875, for the removal of suits to the Federal courts, by the removal of said cause, the same being the first term of this honorable court at which said cause could
113 be tried since the act of Congress was passed, and they now state their desires to remove the said cause to the circuit court of the United States for the southern district of the State of Mississippi, and respectfully pray that your honor may make an order to that effect. And to that end your petitioners here now tender their bond, with W. G. Phelps and Jacob Alexander as sureties, in the sum of five hundred dollars, payable to said complainants, and conditioned according to the

requirements of said act, and pray that the same may be approved, or, if deemed insufficient, they are ready to provide such further or other security as your honor may require. And as in duty bound, &c.

A. J. PHELPS, AND
MARY B. PHELPS,
By W. G. PHELPS,
Their Attorney in Fact and Solicitor in said Cause.

114 And on the 8th day of June, 1877, order for removal was filed herein in the words & figures following, to wit:

THE STATE OF MISSISSIPPI,
Washington County:

In chancery court of said county, to May term, 1877.

HEWETT, NORTON & CO., COMP'TS,
vs.
A. J. PHELPS ET AL., DEF'TS. } 298.

The petition of the defendants A. J. Phelps and his wife, Mary B. Phelps, for a removal of the above-styled cause coming on to be heard this day, and the court being now thereof sufficiently advised, it is ordered, adjudged, and decreed that the said petition be granted, and the bond filed therewith be & is now approved, and the said cause be removed to the circuit court of the United States for the southern district of the State of Mississippi.

Ordered, adjudged, and decreed this 8th day of June, A. D. 1877.

CHARLES CLARK,
Chancellor.

115 And on the 7th day of June, 1877, bond for removal was filed herein in the words & figures following, to wit:

Know all men by these presents that we, A. J. Phelps and Mary B. Phelps, principals, and W. G. Phelps and Jacob Alexander, sureties, are held and firmly bound unto M. O. H. Norton, R. Atkinson, and Arthur L. Stuart, surviving partners of the firm of Hewett, Norton & Co., or the survivors thereof, in the penal sume of five hundred dollars, for the payment of which well & truly to be made we bind ourselves, our heirs, executors, and administrators, jointly & severally, firmly by these presents. Signed with our names & sealed with our seals this 7th day of June, A. D. 1877.

The condition of the above obligation is such that whereas the said A. J. Phelps and Mary B. Phelps have filed their petition in the cause No. 298 in the chancery court of Washington County, State of
116 Mississippi, wherein the said Hewett, Norton & Co. were complainants, and said petitioners and J. Pearce are defendants, praying for the removal of said cause from the said chancery court *of* the circuit court of the United States for the southern district of Mississippi:

Now, therefore, if the said A. J. Phelps and Mary B. Phelps shall enter their appearance in said court at its next session, on the first day thereof, and in said circuit court on the first day of its next session shall enter a copy of the record in said suit, and pay all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully and improperly removed thereto, then the above

obligation to become null & void; otherwise to be & remain in full force and virtue in law.

A. J. PHELPS, [SEAL.]
By W. G. PHELPS,
His Attorney in Fact.
MARY B. PHELPS, [SEAL.]
By W. G. PHELPS,
Her Att'y in Fact.
W. G. PHELPS. [SEAL.]
J. ALEXANDER. [SEAL.]

117 STATE OF MISSISSIPPI,
Washington County:

I, A. W. Shadd, clerk of the chancery court in & for said county, do hereby certify that the foregoing (240) two hundred and forty pages contain a true, correct, & full transcript of the record and proceedings had in the suit of Hewitt, Norton & Co., complainants, against A. J. Phelps et al., defendants, numbered 298 on the docket of said chancery court of said Washington County, Miss., as the same appears and remain on file & of record in my said office.

Given under my hand & official seal this 4th day of August, 1877.

[L. S.] A. W. SHADD, *Clerk.*

And on the 20th day of November, A. D. 1877, the complainants filed in the office of the clerk of the circuit court of the United States for said district their motion to remand this cause to the chancery court of Washington County in the words & figures following, to wit:

118 HEWITT, NORTON & CO. *vs.* A. J. PHELPS ET ALS. } 264.

And now comes the complainants, M. O. H. Norton, survivor, &c., and moves the court to remand this cause to the chancery court of Washington County for the following reasons:

1st. The defendant, Jona. Pearce does not appear to be a non-resident of this State on the face of the bill, and is only so shown by the petition.

2nd. The petition is not signed by the defendants, nor is it shown to and no authority is shown for the signature thereof by the solicitor.

3rd. There is no bond, as required by the act of Congress, and no authority shown for the execution of the bond by the solicitors of the parties.

119 4th. The application for removal comes too late, the principles of law governing the case having all been thoroughly settled by the supreme court and nothing remaining to be done except the statement of the account between the parties.

5th. The petition in the case does not show that this court has any jurisdiction, all the parties to the cause being non-resident' of the State.

6th. The court has no jurisdiction of this case.

W. L. NUGENT,
For Motion.

On the 27th day of October, A. D. 1877, the following order overruling said motion was made and entered of record in the words and figures following, to wit:

120 In U. S. C. c't. In equity. To Nov. term, 1877.

HEWITT, NORTON & CO. }
vs. } 264.
A. J. PHELPS ET AL. }

The motion of complainants herein to remand said cause to the State court coming on this day to be heard, and the court being now thereof fully advised, doth order, adjudge, and decree that the said motion be, and the same is hereby, overruled, and the said cause be remanded to the rules of this court.

Ordered, adjudged, & decreed this 27th day of November, A. D. 1877.

And on the 29th day of November, A. D. 1877, the following order granting leave to the complainants to amend their bill of complaint was made & entered of record in said court in the words & figures following, to wit:

121 HEWITT, NORTON, ET AL. }
vs. } Equity.
A. J. PHELPS ET ALS. }

On motion of complainants' solicitors it is ordered by the court that complainant, have leave to amend their bill herein, in accordance with the opinion herein rendered by the supreme court of this State, by the second Monday in January next.

[NOTE.—The complainants, on the 11th day of February, A. D. 1878, filed in the office of the clerk of the circuit court of the United States for the southern district of Mississippi, in the above-stated cause, their amended bill, in accordance with the opinion rendered by the supreme court of the State of Mississippi, but said amended bill has been lost or mislaid from the files of said cause, and cannot now be found after diligent search.

JAS. M. MCKEE, *Clerk.*]

122 And on the 25th day of February, A. D. 1878, the defendants filed their demurrer to the amended bill in the words & figures following, to wit:

123 HEWITT, NORTON & CO. }
vs. }
A. J. PHELPS & WIFE. }

And now comes the defendants herein, by their solicitors, and not confessing any of the many inaccuracies, uncertainties, and imperfections in the original and amended bills, and now reserving all exceptions thereto, says that said amended bill is not sufficient in law to entitle the complainants to the relief prayed, and said defendants now demur specially to the certain portions thereof herein designated, and assign as grounds of demur' *on* the following:

1st. The allegations as to the non-residence of Pearce is indefinite and

uncertain in regard to the time when he became a non-resident, whether he was a non-resident at the time the original bill was filed.

124 2nd. The allegations as to the distinctions between the trust account of Vick and the trust account of Pearce are vague and uncertain, and if they are to be treated as distinct in law the debt due complainants was the debt of Vick, and to be paid on the basis of an account between Vick and the trust estate.

3rd. On the theory that Pearce became liable for the debt contracted by Vick, then as a matter of law the whole trust and the whole trust account of both trustees are entire, and the bill is defective in not alleging that on the whole trust account the balance would be in favor of the trustee, including this claim.

4th. The bill is defective in not alleging that the account of
125 Pearce would show, including this claim of complainants, a balance in favor of Pearce.

5th. The bill is defective in not alleging that on an accounting between Vick and the trust estate, including this claim, there would be a balance in favor of Vick, trustee, through which complainants, equity of subrogation could be enforced.

6th. The averments in regard to the state of accounts between the trustee and the trust estate are vague, uncertain, and indefinite, in not showing how the balance or balances would actually stand, the averment that this claim, if paid by the trustee, would have been allowed by the court to the trustee being uncertain and insufficient.

7th. The alleged contract with Mrs. Phelps and her husband is not binding in law, and incapable of enforcement, and insufficient as a basis for relief.

126 Wherefore the defendants pray that this be taken and considered as a special demurrer to the said portions of the bill, and that on the hearing that the bill be dismissed, &c.

W. G. PHELPS, AND
F. JOHNSTON.

We certify that in our opinion this demurrer is well taken in point of law, and also that it is not interposed for delay, but solely that the principles of the cause may be settled.

Feb'y 24th, 1878.

W. G. PHELPS,
F. JOHNSTON.
Sol's for Def'ts.

We waive the affidavit by the defendant that this demurrer is not interposed for delay.

W. L. NUGENT,
Atto. for Compl'ts.

127 And on the 25th day of February, A. D. 1878, said cause was set down for hearing upon the hearing-docket in the words and figures following, to wit:

HEWITT, NORTON & CO.
vs.
A. J. PHELPS & WIFE.

Demurrer to amended bill set for hearing this 25th day of February, A. D. 1878, by defendants.

And on the 27th day of February, A. D. 1878, the following interlocutory decree sustaining defendants' demurrer to complainants' bill, as amended, was made and entered of record in said cause in the words & figures following, to wit:

128 HEWITT, NORTON & CO.,
vs.
A. J. PHELPS & WIFE.

This cause coming on to be heard on the defendants' demurrer to the complainants' amended bill, and the same having been argued by counsel for the defendant as well as for the complainant, and the court having fully considered the same, now orders, adjudges, and decrees that the said demurrer be, and the same is hereby, sustained; and the complainant excepting, his exceptions was allowed.

And on the application of the complainants, leave is given them to amend their said amended bill so as to conform to the decisions of the court; and said complainants in open court waiving time, it is ordered that said emendment be made forthwith, which is done.

Ordered, adjudged, and decreed this the 27th day of February, A. D. 1878.

R. A. HILL, *Judge.* [SEAL.]

129 And on the 27th day of February, A. D. 1878, the following affidavit was filed in the said cause in the words and figures following, to wit:

130 In the circuit court of the United States for the southern district of Mississippi. In equity.

HEWITT, NORTON & CO.
vs. 264.
A. J. PHELPS ET ALS.

Personally appeared before me, clerk of the said circuit court, William L. Nugent, solicitor for the complainant, who, being sworn, says that Jonathan Pearce, one of the defendants, is a non-resident of this State, and that his place of residence and post-office address is Shelbyville, in the State of Kentucky.

W. L. NUGENT.

Sworn to and subscribed before me this 27 February, A. D. 1878.

J. M. MCKEE,
Act'g Clerk.

131 And on the 27th day of February, A. D. 1878, the following order for publication was made and entered of record in said cause in the words & figures following, to wit:

132 In the circuit court of the United States for the southern district of Mississippi. In equity.

HEWITT, NORTON & CO.
vs. 264.
A. J. PHELPS ET ALS.

On reading and filing the affidavit of W. L. Nugent, esquire, solicitor for complainant, it appearing therefore that Jonathan Pearce, one of

the defendants, is a non-resident of this State, and that his place of residence and post-office address is Shelbyville, in the State of Kentucky, it is ordered that the said Pearce enter his appearance herein on or before the first Monday in April next, and plead answer or demur to the complainants' original and amended bill filed in this cause, or the same will be taken for confessed as to him; and it is further ordered that a copy of this order be published in the Weekly
133 Clarion, a public newspaper of this State, printed and published in the city of Jackson, in this district, once a week, for five consecutive weeks, and mailed by the clerk of this court, postage prepaid, to the said Pearce, at the post-office address designated in said affidavit.

Ordered, adjudged, and decreed this 27th Feb'y, A. D. 1878.

R. A. HILL, *Judge.*

And on the 27th day of February, A. D. 1878, the following order was made & entered of record in said cause, to wit:

HEWITT, NORTON & CO.
vs.
A. J. PHELPS & WIFE.

It is now ordered by the court that the defendants are allowed thirty days from this date within which to plead answer to demurrer to the complainants' second amended bill, this day filed by leave of the court.

And on the 23 day of March, A. D. 1878, complainants file their amended bill in the words & figures following, to wit:

134 *Amendment to bill.*

In the circuit court of the United States for the southern district of Mississippi. In equity.

HEWITT, NORTON & CO.
vs.
A. J. PHELPS & WIFE.

And now comes the complainant' and, under leave of court granted to amend their bill in pursuance of the decree of the court sustaining the demurrer to their amendment filed February 11, 1878, say as follows:

On the 21st day of February, 1871, and before that time, the said Jonathan Pearce was a non-resident, and still is a non-resident, of this State, and at the time of the settlement of his accounts as hereinbefore stated, and the taking and thence to the surrender of possession of the said trust property, and at the time of the filing of your orators' original bill, had no means or property out of which your orators' said
135 debt could be made, nor had he when made a party to these proceedings any property or means in this State of any kind, character, or description.

The account out of which your orators' said debt grew was commenced in the name of the said Jonathan Pearce, trustee, and was opened on the 5th day of March, 1861, by the payment of a draft of the said H. W. Vick, trustee, for two thousand dollars, to pay the taxes due and owing upon the said trust property, which, under the statutes of this State, were a *lein* upon said property, & some current expenses; of the

said sum of two thousand dollars sixteen hundred and eight $\frac{47}{100}$ dollars, were by said Vick so applied. On the 21 March, 1861, your orators paid another draft of two hundred and fifty dollars on account of said trust estate, and on the 23rd March, 1861, advanced supplies on
136 account of said estate equal in value to two hundred and ninety-four $\frac{97}{100}$ dollars. On the 5th of April, 1861, your orators advanced for said trust estate one hundred and twenty barrels of pork, of the value of twenty-one hundred and twenty-one $\frac{50}{100}$ dollars, and on the same day other necessary plantation supplies, amounting to the sum of twenty-four hundred and five $\frac{93}{100}$ dollars. About or presently after the said 5th day of April, 1861, the said H. W. Vick departed this life, whereupon the said Jonathan Pearce took possession and active personal control of said trust estate, and, under said deed, possessed, managed, and controlled the same as trustee up to the year 1865, when it was surrendered to the said defendants Phelps & wife. The said items heretofore charged in your orators' said account were, at his instance and by his consent, charged to the said Pearce, trustee, in
137 account which was thereafter continued in his name as trustee, until the 30th day of June, 1862, at which time there was a balance in account due your orators by said Pearce of ten thousand three hundred and seventy-seven $\frac{80}{100}$ dollars. The said account showing said balance was duly rendered to said Jonathan Pearce on that day, and was by him admitted to be correct and due and owing by him; a copy of said account is herewith filed, marked Exhibit A, and is found in the record filed at pages 91, 92, and 93.

The said two thousand dollars so paid out on account of the taxes of said trust property and current expense of the said property was advanced on the faith of forty-seven bales of cotton, which were shipped by said Henry W. Vick, trustee, to and sold by your orators, and the proceeds, some eighteen hundred and fifty $\frac{17}{100}$ dollars, were applied to the credit of said account; other credits were applied up to April
138 30th, 1861, which amounted in the aggregate to the sum of $3,161.98. The said balance in said account of June 30, 1862, was carried forward in account to the credit of the said Jonathan Pearce, with his knowledge & consent & at his request; and on the 3d day of October, 1866, an account current was rendered by your orators to him showing a debt balance by him of $7,631.16, which said account was admitted by said Pearce to be a just and true account, and a copy thereof is herewith filed as Exhibit B. On the 30th June, 1864, there was paid to your orators, on account of the balance stated to be due in the said first-mentioned account, four thousand and seventy-six $\frac{10}{100}$ dollars, and the said sum of $7,631.16 was the balance due after sundry other debts & credits entered in the said account. An itemized statement of the supplies of all kinds charged in said account current is herewith
139 filed as Exhibit C and prayed to be taken as part of this bill, and are found in the record from the chancery court of Washington County, Mississippi, from page 156 to page 165. All the items therein charged anterior to the time when said Pearce took possession were for clothing and provisions for the negro slaves belonging to said trust estate, which were used by the said Pearce after he took possession of said estate, in and about the same, and charged to him in account as heretofore stated, and he became bound and liable therefor as if he had himself purchased the same, and the said items were paid by him and said Vick, as heretofore stated. The balance stated to be due 3 day of October, 1866, was a balance due by the said Pearce, trustee, to your orators, including the balance admitted by him to be due

140 as above stated in October, 1865, as alleged in your orators' orignal bill, the difference arising out of sundry debts and credits after that time entered with the knowledge and consent of said defendants Phelps & wife, and by and through the said Pearce, and the said balance was admitted by said Pearce, trustee, to be due and owing by him.

The said Henry W. Vick, trustee, at the date of the deed from said Sarah Vick to said Jonathan Pierce, was a man of no means, property, or credit whatever, and continued in the same condition up to his death.

The said Pearce, when he took possession, was in the same financial condition, and is still a non-resident of this State, resident and living at Shelbyville, in the State of Kentucky. All the items charged in your orators' said account for money loaned and supplies furnished were necessary and proper under the deed of the said Sarah Vick, and

141 the said money and supplies were applied to the use and benefit of the trust estate, and upon a settlement of the accounts of the said Jonathan Pearce, she would have had the right to charge the same against the said estate, and the balance due to him by said estate would have been, and would now by, equal in amount to the debt now claimed by your orators, exclusive of all other items allowed and paid by said Phelps & wife. In fact, the said Pearce was called to a settlement, as hereinafter stated, by the said A. J. Phelps & wife, and upon that settlement stated that the claim of your orators was a debt due by said trust estate, and the said claim was admitted by the said Phelps and wife to be due and owing, and that the said estate was bound and liable therefor. The said debt due your orators was not included in

142 the settlement of said Pearce, but was admitted therefor by consent of parties upon the agreement and understanding that the said Phelps & wife would assume, pay off, and discharge the same by shipment of the cotton crop then growing on said estate, and had the same been included the balance due said Pearce would have increased to the extent of the amount due your orators as aforesaid. Without said agreement & understanding the said Pearce never would have surrendered possession of said estate.

The premises your orators pray as in their said original bill, and that all necessary accounts be taken in the premises, &c., &c.

W. L. NUGENT.

And on the 23d day of March, A. D. 1878, defendants file their demurrer to complainants' second amended bill in the words & figures following, to wit:

143 HEWITT, NORTON & CO. *vs.* PHELPS & WIFE. } 264.

And now come the said defendants, by their solicitors, and without confessing the many errors and uncertainties of the bill of the complainant as now amended, but reserving all manner of exceptions to the many errors, imperfections, and uncertainties therein contained, say that the same is insufficient and does not entitle the complainant to any relief, and they demur thereto specially and now assign as special grounds of demurrer the following to the said several portions of the bill herein specified:

1st. The debt contracted by Vick, trustee, in his lifetime, set up by the complainant, is barred by limitation, as shown by the said

144 bill, so far as the same can be treated as an equitable claim against the trust estate.

2nd. Though the Vick account was charged to Pearce and the latter made personally responsible, it was notwithstanding barred by limitation before Pearce was made a party defendant to this cause.

3rd. The second amended bill seeks to evade the decision of this court requiring a separate and distinct account of the administrations of the two trustees Vick and Pearce, and though the debts, as shown, was contracted by Vick, yet it seeks to evade an account between Vick and the trust estate.

4th. The allegations that Pearce became personally bound for Vick's debts only imposed at most a personal liability upon Pearce,
145 which, if paid by him, would have put him in Vick's position as to the trust estate, and does not in law or equity bind the trust estate, nor does it avoid the necessity for an inquiry into Vick's accounts with the trust estate.

5'. There is no allegation to show that the estate was indebted to Vick, or would have been if he had paid this debt.

6th. The whole second amended bill is an attempted evasion of the law of this case, as settled by the honorable court, that the transaction of the trustees, so far as respects the liability of the trust estate, are separate, that each settles his own debts and accounts separately with the trust estate.

7th. The bill, as amended, seeks to make an entirely new case against the estate.

146 8th. And for other causes to be assigned at the hearing.

Whereupon they pray that this may be taken as a special demurrer to said portions of said amendment, and that the bill be dismissed.

W. G. PHELPS, &
FRANK JOHNSTON, *Sol's.*

We hereby certify that the above demurrer is well taken and good in law.

W. G. PHELPS, *Sol.*

Affidavit of the defendants that the demurrer is not interposed for delay is thereby waived, and the demurrer to be treated and regarded in all respects as if said affidavit, as required by the rules of court, was appended hereto.

This March 4, 1878.

W. L. NUGENT,
Att'y for Com.

147 An on the 30th day of May, A. D. 1878, the following order of defendants was filed in the said cause, to wit:

HEWITT, NORTON & CO. }
vs. }
A. J. PHELPS & WIFE. }

The clerk will set down the demurrer to the second amended bill herein for hearing this 30th day of May, A. D. 1878.

F. JOHNSTON, &
W. G. PHELPS,
Sol's for Def'ts.

And on the 8th day of May, A. D. 1878, the following order was made of record in said cause, to wit:

HEWITT, NORTON & CO.
vs.
A. J. PHELPS & WIFE.

Order that this cause be set down for hearing on defendants' demurrer to the amended bill of complaint on the third week of the present term.

148 And on the 1st day of June, A. D. 1878, final decree was rendered in said cause and entered upon the minutes of said court in the words & figures following, to wit:

149 In U. S. C. C., to May term, 1878.

HEWITT, NORTON & CO.
vs.
A. J. PHELPS.

This cause coming on this day to be heard on the demurrer to complainants' bill, as amended, and the same having been fully argued by counsel for both parties, and the court being now thereof fully advised, and being satisfied that said demurrer is well taken to said bill as amended, it is, therefore, ordered, adjudged, and decreed that the said demurrer be, and the same is hereby, sustained; and it is, therefore further ordered, adjudged, and decreed that complainants' bill as amended be, and the same is hereby, wholly dismissed, and that the complainants pay the costs of this cause both in the State courts and in this court to be taxed, and that execution issue therefor;
150 from which decree of the court the complainants pray an appeal to the Supreme Court of the United States, which appeal is granted by the court upon their entering into bond, with surety, in the sum of five hundred dollars, payable to defendants, and conditioned for the payment of the costs, which bond shall be approved by the court or one of the judges thereof.

Ordered, adjudged, and decreed this 1st day of June, A. D. 1878.

R. A. HILL, *Judge.*

151 And on the 18th day of April, A. D. 1879, the following appeal bond of complaint was filed in said cause in the words and figures following, to wit:

152 Know all men by these presents that we, A. L. Stuart, liquidator of the late firm of Hewitt, Norton & Co., and Hesse Addison & James M. Courtney, have nominated, constituted, and appointed W. L. Nugent, of Jackson, Mississippi, attorney-at-law, our true and lawful agent & attorney in fact, for us and in our names, to make, execute, and deliver to the clerk of the circuit court of the United States for the southern district of Mississippi a bond in the penalty of not exceeding one thousand dollars to perfect the appeal granted by the said circuit court to the Supreme Court of the United States from the final decree dismissing the bill filed by said Hewitt, Norton & Co. against A. J. Phelps and wife in equity, said cause bearing docket number, and to take all lawful steps in the premises, hereby satisfying, approving, and all he may do as if said by .

Given under our hands and seals this 31st day of March, A. D. 1879.

A. L. STUART, *Liquidator.* [L.]
HESSE ADDISON. [L.]
JAS. M. COURTNEY. [L.]

{ JOHN G. EUSTIS, U. S. COMMISSIONER. } J. G. EUSTIS, *U. S. Commissioner.*

153 Supreme Court of the United States.

HEWETT, NORTON AND CO.
vs.
A. J. PHELPS, MARY B. PHELPS, AND JONAthan Pearce.

Know all men by these presents that we, A. L. Stuart, liquidator of the late firm of Hewitt, Norton & Co., Hesse Addison, James M. Courtney, and William N. Nugent are held and firmly bound unto A. J. Phelps, Mary B. Phelps, & Jonathan Pearce in the penal sum of five hundred dollars, to the payment of which well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals & dated this 16th day of April, A. D. 1879.

Whereas the above-bound Hewitt, Norton & Co. have prayed for and obtained an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled cause by the circuit court of the United States for the southern district of Mississippi on the first day of June, A. D. 1878, whereby the complainants' bill as amended was dismissed:

154 ow, therefore, the condition of this obligation is such that if the above-bound Hewitt, Norton & Co. shall prosecute said appeal to effect, and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

HEWITT, NORTON & CO., [L. S.]
By WILLIAM L. NUGENT, *Att'y in Fact.*
A. L. STUART, *Liquidator*, [L. S.]
By WILLIAM L. NUGENT, *Att'y in Fact.*
HESSE ADDISON, [L. S.]
By WILLIAM L. NUGENT, *Att'y in Fact.*
JAMES M. COURTNEY, [L. S.]
By WILLIAM L. NUGENT, *Att'y in Fact.*

Bond & security approved Ap'l 18th, 1879.

R. A. HILL, *Judge.*

The following are the opinions of the court rendered in said cause, to wit:

155 *Opinion.*

In the circuit court of the United States for the southern district of Mississippi, November term, 1878.

HEWETT, NORTON & CO.
vs.
A. J. PHELPS & WIFE.

The questions presented for decision arise upon defendants' demurrer to the bill as amended.

The purpose of the bill is to obtain payment of a debt charged to be due complainants for supplies furnished H. W. Vick and Pearce, as trustee of an estate conveyed by the mother of Mrs. Phelps to said Vick and Pearce for the benefit of Mrs. Phelps and her brothers and sisters, all of whom have since died and left to Mrs. Phelps the entire estate by de'cent or dec*rise*, and which is now in her possession. The deed by which this trust estate was created conveyed the legal title to the property to Pearce, as trustee, but constituted her hus-
156 band, H. W. Vick, and father of Mrs. Phelps, a cotrustee, for the management of the estate, with full powers to manage and control the same for the benefit of the cestue que trust. The deed confers no power upon either of the trustees to create any new liabilities or encumbrances upon the trust estate, but did provide for discharging those then existing. The bill charges that Vick controlled the estate until his death, in 1861, when Pearce took control of it, and continued to control and manage it until in 1865, when he surrendered it to defendants. That claim sought to be enforced is for supplies furnished to these trustees or to Vick for and applied to said trust estate, consisting of a large plantation, slaves, and other property, which, under the powers and directions contained in the deed, were controlled
157 and managed by said trustees, as above stated; that Vick is dead and Pearce is a non-resident of the State, and has no property in the State out of which complainants' demand can be satisfied.

The bill as amended further charges that at the time defendant received the trust estate from Pearce it was expressly agreed that Pearce was not to be responsible personally for any debts created by Vick *or* trustee, and that complainants' demand was for supplies furnished Vick as trustee for the benefit of the trust estate, and that defendants promised to ship the cotton crop raised on the estate that year in payment of the same. These are all the charges in the bill that need be stated to the understanding of the questions presented by the demurrer, which are substantially as follows:

First. That the bill does not allege that Pearce was a non-resi-
158 dent or without means in this State when the bill was filed.

Secondly. That it does not allege that any amount is due from either of said trustees upon an accounting with the defendants in relation to said trust estate.

Thirdly. That the alleged contract between Pearce and the defendants is not binding in law and is incapable of enforcement as the basis of the relief prayed for.

These several grounds relied upon will be considered together.

The rule is well settled, both by the elementary books and adjudicated cases, that a person dealing with a trustee must look to the trustee personally for payment of any obligation incurred by his, the trustee, in the management of the trust estate, and not to the estate itself, and such has been the ruling of the supreme court of this State, from
159 the case of Wood vs. Ridley, 27 Miss., 119, down to the decisions of that court in this case when it was before it (manuscrip opinion). Whilst this is the general rule, there are exceptions to it growing out of the relation of the parties, and this is one of the exceptional cases, provided complainants bring themselves by pleading and proof within the exception. The exception is that when the trustee makes a contract binding on himself for the loan of money, the purchase of supplies, or any other thing which is applied to the use and benefit of the trust estate, and for which he has a right to charge the estate, and upon a settlement of his accounts with the estate a balance is found due him from

the estate and the trustee is a non-resident of the estate or is insolvent, in such case a court of equity will lay hold of such balance in
160 the hands of the cestue que trust if he has received it, or if the estate is still in the hands of the trustee, and apply it to the payment of the liability of the trustee to the creditor who thus furnished the money or means with which the trustee became entitled to charge the trust estate. This is done by subrogate' the creditor to the rights of the trustee; in such case the creditor, being placed in the shoes of the trustee, can claim nothing more than the trustee could himself claim against the trust es'ate, and he could only claim the balance due him after discharging all his liabilities to the estate. As the trustee could only establish this balance by a settlement of his trust accounts under proper proceedings against the cestue que trust where he has surrendered the estate, the creditor, seeking relief through the rights
161 of the trustee, must pursue the same course; that it must allege that there is a balance due the trustee and seek an account to establish that balance by proper proceedings. The cestue que trust stands on the defensive and cannot be called upon to respond until the balance is shown to be due, the burthen of showing which is upon the creditor. The case is very much like a judgment creditor who failing to obtain satisfaction of his judgment by legal process reverts to a court of equity to reach the equitable assets of the defendant, or where a judgment creditor failing to find property subject to execution by process of garnishment reaches the money of the defendant in the hands of his debtor. Under the provisions of the deed, Pearce is in no way liable for
162 the debts contracted by Vick. The two trusteeships are in no way blended together; consequently the complainants must allege and prove an indebtedness from Vick to the estate upon a settlement of the accounts of Vick's transactions as trustee, and if intending to charge the trust estate through Pearce must in like manner allege and establish by proof an indebtedness from the estate to Pearce upon a settlement of his accounts; it is further necessary to allege and prove that at the time of commencing the suit Pearce was a non-resident or insolvent.

The defendants cannot be held to a promise to pay an indebtedness upon the part of the trustee until such indebtedness is shown to be an incumbrance upon the estate received by them, which, as stated, can only be shown by an indebtedness on the part of the estate upon
163 a settlement of the trustee's account. Applying these rules to the allegations of the bill as amended, I am satisfied the demurrer to the bill is well taken, and must be sustained.

R. A. HILL, *Judge*.

164 In the circuit court of the United States for the southern district of Mississippi, June term, 1878.

HEWITT, NORTON & CO.
vs.
A. J. PHELPS & WIFE.

The questions now presented arise upon defendants' demurrer as amended by the paper filed as an amendment on the 23d day of March, 1878.

The bill, with the amendment and exhibits, show' the following facts: Henry W. Vicks, as trustee under the will of his brother, Gray I. Vick, and a trust-deed executed by his wife, Sarah, was in possession

and manager of a large trust estate, consisting of a large real estate, slaves, &c., with which he for a number of years carried on the
165 cultivation of large crops of cotton and corn for the benefit of his children, and to the remainder of which the defendants Mrs. Phelps, by de'cent and otherwise, is the owner. Vick, as such trustee, from time to time procured from complainants advances in money and supplies for the use of this trust property, and shipped to them cotton to be sold, and the proceeds applied to the payment for such supplies and advances.

Vick died in April, 1861. At the time of his death there remained due complainants for these advances $7,418.17, less proceeds of sale of cotton shipped by H. W. Vick in his lifetime, being 185,017, leaving balance due on this part of the account $5,568.60.

After the death of Vick, and when Pearce took charge of the estate as trustee, this balance was carried forward as a charge against
166 Pearce or the estate, and with the interest up to the final rendition of the account, 3' day of October, 1866, amounts to the sum of $7,999.36, exceeding the sum they claimed to be due complainants.

It is claimed by the amendment that other credits were given on this account before Vick's death, but the account exhibited with the original bill fails to show it. The account exhibited with the original bill purports to have commenced with Pearce 1st March, 1867, but the allegations and transactions shown by the bill as amended is inconsistent with the position that the part of the account under consideration was so originally entered.

A number of grounds of demurrer are stated, but that mainly relied upon is that this account was a personal charge against Henry
167 W. Vick, and is not a charge against Pearce as trustee or individually.

The rule upon the question as to the liability of trust estates for purchases made by trustees is stated in the opinion of this court when considering the demurrer to the former amendment to the bill, decided at last term, and the authorities therein referred to, and to which reference is now made. I am satisfied, from a careful consideration of the original bill, with the exhibits to it as part thereof, with the amendment under consideration under these rules, show the debt claimed to be the personal liability of Henry W. Vick, and not that of Pearce, through whom it is sought to charge this trust estate.

168 The result is that the demurrer must be sustained and the bill dismissed, at the cost of the complainants, both in the chancery court of Washington and in this court.

R. A. HILL, *Judge.*

169 In the circuit court, United States, southern district of Mississippi. In equity.

HEWETT, NORTON & CO.
vs.
A. J. PHELPS ET AL.

By the honorable R. A. Hill, judge of the district court of the United States for the southern district of Mississippi, and presiding judge of the circuit court of the United States for the said southern district of Mississippi.

To A. J. Phelps and Mary B. Phelps, his wife, or Frank Johnston, esq., their attorney of record:

Whereas Hewett, Norton & Co. have lately appealed to the Supreme

Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of Mississippi, in equity, made in favor of you, the said A. J. Mary B. Phelps, and has filed the security required by law, you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Oxford, in the northern district of Mississippi, the 18th day of April, in the year of our Lord one thousand eight hundred and seventy-nine.

R. A. HILL,
District Judge U. S. and Presiding Judge
Circuit Court U. S. So. Dis. Mississippi.

To the marshal for the southern district of Mississippi to execute and return.

UNITED STATES OF AMERICA,
So. Dis. Miss.:

Personally appeared before me, clerk of the circuit court of the United States for said district, William L. Nugent, one of the solicitors for complainant in the case of Hewett, Norton & Co. vs. A. J. Phelps & Mary B. Phelps, his wife, & Jonathan Pearce, who, being sworn,
170 says that on this 18th day of April, A. D. 1879, he delivered a true copy of the foregoing citation in appeal and of the order granting the appeal to Frank Johnston, esq., solicitors for the appellees A. J. Phelps & wife, and executed the same personally upon him.

W. L. NUGENT.

Sworn to & subscribed before me this 18th April, A. D. 1879.
JAS. M. McKEE, *Clerk.*

(Indorsed:) No. 264. Hewett, Norton & Co. vs. A. J. Phelps et als. Citation in appeal. Filed Apr. 18th, 1879. J. M. McKee, cl'k.

171 UNITED STATES OF AMERICA,
Southern District of Mississippi:

I, Jas. M. McKee, clerk of the circuit court of the United States for the southern district of Mississippi, do hereby certify that the foregoing one hundred and sixty-nine pages do contain a true, full, and perfect transcript of all the pleas, process, orders, and decrees had and done in a cause lately pending in the circuit court of the United States for the southern district of Mississippi, wherein Hewett, Norton & Co. were complainants and A. J. Phelps et als., defendants, as fully and completely as the same now remains on file and of record in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court hereto, at office in Jackson, in said district, this 26th day of July, A. D. 1879.

[SEAL.] JAS. M. McKEE, *Clerk.*

172 Supreme court Miss., April term, 1877. Monday, May 21, 1877.

M. O. H. NORTON ET AL. *v.* A. J. PHELPS ET AL. } 2431.

This cause having been submitted on a former day of this term upon the record herein from the chancery court, Washington County, and

this court having sufficiently examined and considered the same, and being of opinion that there is error therein, doth therefore order, adjudge, and decree that the decree of said court rendered in this cause dismissing the bill be, and the same is hereby, reversed and cause remanded, with leave to both parties to amend pleadings as they may be advised, and to take testimony, and for an account to be taken in accordance with the views contained in the opinion rendered herein.

And it is further considered, and so ordered and adjudged and decreed, that the plaintiffs in error do have and recover of the defendants in error the costs of this cause in this court expended, &c., to be taxed, &c.

I, Oliver Clifton, clerk of the supreme court of Mississippi, do hereby certify that the above and foregoing is a true and correct copy
173 of the final judgment in said cause (No. 2431) as the same appears of record in my office. Said judgment was rendered May 21, 1877, on minute-book E, page 293.

Witness my hand and the seal of said supreme court, at office at Jackson, this May 12, 1881.

[SEAL.]

OLIVER CLIFTON, *Clerk*,
By C. C. CAMPBELL, *D. C.*

This is the corrected judgment of the supreme court of Mississippi in the case stated, and the final order made.

The mandate was sent down, and on petition of Phelps & wife the order was corrected, because the state of the pleadings did not warrant an account. I consent that defendants may have all the benefit allowable upon the facts as stated.

W. L. NUGENT,
Sol. for Appellants.

(Endorsed:) Supreme Court U. S., 1880, October term. No. 229. Hewitt, Norton & Co., app'ts, vs. A. J. Phelps et al. Certified copy of final decree and consent. Filed 13 June, 1881.

(Indorsement on cover:) No. 229. Hewitt, Norton & Company, appellants, vs. A. J. Phelps and Mary B. Phelps. S. Mississippi C. C. U. S. Filed 19th August, 1879.

ADDITION TO RECORD. No. 229.

Supreme Court of the United States.

OCTOBER TERM, 1881.

HEWITT, NORTON & CO., APPELLANTS,
vs.
A. J. PHELPS ET AL. } No. 229.

1 In the circuit court of the United States for the southern district of Mississippi. In equity. January special term, 1880.

HEWITT, NORTON & CO.
vs.
A. J. PHELPS ET AL.

On the application of complainants' solicitors, it appearing to the satisfaction of the court that the amendment to the bill in this cause filed under the leave contained in the order of the supreme court of Mississippi, on the 11th day of February, A. D. 1878, has been lost, and the solicitors of complainants having then tendered to the court a substantial copy of said amendment, accompanied by an agreement of the counsel for defendants: It is therefore ordered, adjudged, and decreed that the said copy be filed in the place of the said original amendment, and held and taken as a supply of the said lost record; and it is further ordered, adjudged, and decreed that a copy of the said amendment, with this order, be certified by the clerk of this court to supply the loss in the record heretofore sent up.

Ordered, adjudged, and decreed this 2d Feb'y, A. D. 1880.

R. A. HILL, *Judge.*

2 In the circuit court of the United States for the southern district of Mississippi. In equity.

HEWITT, NORTON & CO.
vs.
A. J. PHELPS ET ALS.

And now come the complainants, and under the leave contained in the opinion and order of the supreme court of said State in said cause, and by leave of this court, amend their bill in this cause by adding thereto, prior to the prayer thereof, these allegations:

"The claim sued on here consisted of necessary plantation supplies for the plantation and slaves included in said trust deed, and the payment of necessary expenses incurred in the management thereof by the said Vick and Pearce, trustees under said deed. The said Henry W. Vick departed this life in April, 1861, and the said James Pearce at once succeeded to the management and possession of the said plantation and slaves. The said Jona. Pearce is a non-resident of this State,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D., 1881.

NO. 229.

HEWITT, NORTON & CO.,

VS.

A. J. PHELPS AND MARY B. PHELPS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

ASSIGNMENT OF ERRORS AND ARGUMENT BY WILLIAM L. NUGENT, SOLICITOR FOR APPELLANTS.

CLARION STEAM PRINT, Jackson, Miss.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D., 1881.

NO. 229.

HEWITT, NORTON & CO.,

VS.

A. J. PHELPS AND MARY B. PHELPS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

ASSIGNMENT OF ERRORS AND ARGUMENT BY WILLIAM L NUGENT, SOLICITOR FOR APPELLANTS.

On the 17th day of April, 1869, Hewitt, Norton & Co., exhibited their bill in the chancery court of Washington county, Mississippi, against A. J. Phelps and Mary B. Phelps, his wife, to recover a debt for which certain trust property in their possession was believed to be bound. The facts, as stated in the bill, are about as follows:

On the 4th day of May, 1850, Sarah Vick and Henry W. Vick, her husband, executed and delivered to Jonathan Pearce, trustee, a deed conveying the property sought here to be charged, upon certain trusts and conditions, which the court will find detailed at length in the bill. Printed Record, pp. 2 and 3. As to the lands here in suit, and the slaves then employed in their cultivation, the proceeds thereof were to be applied to the payment of a debt due to the trustees of the bank of the United States, and after payment of that, the proceeds of said property, over and above what was necessary to support the plantation and family, were to be invested for the benefit of all the children of Sarah Vick living at the time of her death. But the trustee, Pearce, was to permit Henry W. Vick, husband of grantor, "*as agent for said trustee and as agent and trustee for Sarah Vick during her life, and as agent and trustee for her children after her death, to superintend, possess, manage and control said property for the benefit of all concerned.*" And the property was always to stand charged for the payment of "*such*

amount as may be necessary for the liberal support and maintenance of said Henry W. Vick during his natural life." It was expressed in the deed to be the intention of Sarah Vick, that "Henry W. Vick should be regarded for the purposes of the deed not merely as an agent, but also a co-trustee, and Pearce was in no manner to be responsible for his acts and conduct." P. R. 3.

Mary B. Phelps is the only person in being who is beneficially interested in the property sought to be charged. On the 5th day of April, 1861, said Henry W. Vick having departed this life, Pearce, as trustee under this deed, took actual possession of the trust property, including the plantation and slaves in Washington county, Mississippi, *then heavily encumbered with debt*, and proceeded to the execution of the powers conferred upon him. In June, 1861, he was duly appointed guardian of the person and estate of Mary B. Phelps, then unmarried and nineteen years of age. As trustee and guardian he made regular reports to the Probate Court of said county of all his actings and doings; and in October, 1865, exhibited to said Probate Court a final account showing himself to be indebted to the trust estate in the sum of $2,768 53, all of which he afterwards paid to Mary B. Phelps. As an accompaniment to, and explanatory of, said final account, said Pearce made a report in writing to said Probate Court, in which he represented that the estate of Mary B. Phelps was justly indebted to appellants in the sum of $10,337 80, less a credit of $4,076 19, leaving a balance at that date of $6,301 71. This final account and report were allowed and the trustee discharged. Mary B. Phelps and husband thereupon took possession of the trust property, and have ever since been in the use of the same, receiving the rents, issues and profits thereof. As trustee and guardian said Pearce exhibited to the said Mary B., after she became of age, a statement of said final account and report; and after examination and with a full knowledge of the matter, she ratified, agreed to and accepted the same, and suffered and permitted Pearce to be discharged. Subsequent to the rendition of said final account and report, but before the discharge of said Pearce, appellants paid S. S. Perkins, a creditor of the trust estate, $907 18, and to the trustee Pearce, as an allowance for commissions, $1,587 56, out of the proceeds of 20 bales cotton shipped to them by said Pearce. On the 3d October, 1866, they rendered to the said Pearce an account current of that date showing a balance due them of $7,631 16, which said account was by said Pearce admitted to be correct and due and owing. Said account current was duly exhibted to the said Mary B. and A. J. Phelps, who, after due examination, admitted the same to be a correct account and a legal and proper charge against them, and a liability for which the trust estate was bound. Said account was for supplies and money advanced to the said Henry W. Vick and Jona. Pearce, trustees as aforesaid, for the support and maintenance of the plantation in Washington county, and of

Henry W. Vick and Mary B. Phelps, in strict accordance with the terms and tenor of the trust deed. Notwithstanding which, though often requested, Phelps and wife have hitherto wholly failed and refused and still fail and refuse to pay the same or any part thereof. The balance stated to be due appellants on the 3d October, 1866, remains and is wholly due and unpaid.

The prayer of the bill was for an account, and an adjudication that the property was bound for the debt asserted against it, and the appointment of a trustee to pay the same out of rents and profits, etc. P. R. 3, 4, 5. The bill is verified by the affidavit of one of the complainants.

On the 10th day of November, 1869, Phelps and wife demurred to the bill. On the 21st February, 1871, the demurrer was confessed in part; and overruled as to all the other points made. R. 12. By leave of court the itemized account was filed and Jona. Pearce was made defendant to the bill by *interlineation*. Publication was made as to Jonathan Pearce, who was a non-resident of the state. R. 15. On the 22d day of May, 1871, a demurrer was filed to the bill as amended for certain reasons assigned. R. 14. The cause was continued at the fall term, and the demurrer was stricken from the files April 23, 1872, and an appeal granted. R. 17. On the 22d January, 1873, this appeal was dismissed by the supreme court of Mississippi. On the 11th March, 1873, Phelps and wife filed their answer; on the 2d Nov., 1874, *pro confesso* was entered against Pearce, trustee; and on 7th Nov., 1874, the cause was submitted for final hearing and the bill was dismissed, the "court being of opinion that the complainants have not made out such a case as will entitle them to the relief sought as against Phelps and wife." On the *20th day of March*, 1877, an appeal was prosecuted, and this final decree was, on the 21st May, 1877, reversed by the supreme court of Mississippi, and the cause remanded for amendment to pleadings and for an account, etc. R. 30, 47.

The mandate from the supreme court was filed in the chancery court of Washington county, on the 7th day of June, 1877, and on the same day Phelps and wife entered their petition for the removal of the cause to the circuit court of the United States for the southern district of Mississippi, giving bond, etc. R. 31, 32.

On the 20th day of November, 1877, the appellants moved the said circuit court to remand said cause for the reasons stated in their motion. R. 33. This motion was overruled on the 27th day of November, 1877. R. 34. On the 11th day of January, 1878, appellants, by leave of court, amended their bill in accordance with the opinion rendered by the supreme court of Mississippi, and the defendants, Phelps and wife, demurred thereto on the 25th February, 1878. R. 34, 35. This demurrer was sustained February 27, 1878, and appellants took leave to amend their bill so as to conform to the decision

of the said circuit court. R. 36. This was done March 23, 1878. R. 37, 38. Appellees demurred thereto and their demurrer was sustained and the bill and amendments were dismissed June 1, 1878. R. 41. Hence this appeal.. The opinion of the court is found on pages 43, 44, of the printed record, and the rule governing this case stated thus: "The two trusteeships are in no way blended together; consequently the complainants must allege and prove an indebtedness from Vick to the estate upon a settlement of the accounts of Vick's transactions as trustee; and, if intending to charge the trust estate through Pearce, must in like manner allege and establish by proof an indebtedness from the estate to Pearce upon a settlement of his accounts. It is further necessary to allege and prove that at the time of commencing the suit the said Pearce was a non-resident or insolvent."

"The defendants cannot be held to a promise to pay an indebtedness upon the part of the trustee until such indebtedness is shown to be an incumbrance upon the estate received by them, which, as stated, can only be shown by an indebtedness on the part of the estate, upon a settlement of the trustee's account." Or as said elsewhere in the opinion: "This is done by subrogating the creditor to the rights of the trustee; in such case the creditor, being placed in the shoes of the trustee, can claim nothing more than the trustee could himself claim against the trust estate, and he could only claim the balance due him after discharging all his liabilities to the estate."

In view of this statement of the cause, we say that manifest error hath intervened in the record thereof and proceedings had therein to our prejudice, in this:

1. The court erred in overruling the motion to remand the cause to the chancery court of Washington county. The motion should have been sustained and the cause remanded.

2. The court erred in sustaining the demurrer to the bill as amended under the judgment or decree of the supreme court of Mississippi, which became the law of the case governing and controlling it as well in the courts of the United States as in the state courts. The demurrer should have been overruled.

3. The court erred in sustaining the demurrer to the bill as amended finally to conform to the ruling of the circuit court of the United States. The case as presented under the original bill and amendments, entitled appellants to relief, and the demurrer should have been overruled. Wherefore we pray that the judgment of said circuit court be reversed, etc.

I.

The cause was removed under the act of 1875. It was commenced in the chancery court of Washington county, April 17, 1869, and all the principles involved in it were settled by the supreme court of Mississippi, on the 21st of May, 1877. The

cause was remanded for a statement of the account, printed record, 30; but afterwards, on the examination of the pleadings, it was discovered by the court, that Pearce was not charged in the bill to have been a non-resident of the state or insolvent, and the order was modified so as to allow the requisite amendments to the pleadings to be made prior to the taking of the account. As the *facts* are not disputed, the petition for removal showing Pearce's *non-residence*, the amendment was purely formal. The cause was determined by the chancery court of Washington county, on the 7th November, 1874, prior to the passage of the act of 1875; and the question is: Can a cause, the principles of which have been finally settled, be removed under the act of 1875, when the final decree passed *prior* to the passage of the act of 1875, *has been subsequently reversed* and the cause remanded for an account, or for an amendment and account? Of course there are other objections to the removal on which much reliance is placed, but this is the main issue. The petition for removal states, that when he was made a party to the suit,—prior to February 4, 1871,—Pearce had become a citizen of the State of Kentucky, and continued so to be. P. R. 31.

All suits *pending in any State Court on 3d March*, 1875, when the act of congress was approved, or *thereafter brought*, when the matter in dispute exceeds five hundred dollars, and in which there shall be a controversy between citizens of different States, are removable under the act. The appeal from the final decree rendered in this cause by the chancery court of Washington county was not taken until *March* 30, 1876, and the cause was finally determined by said chancery court, on the *7th November*, 1874; it could not, then, be said to be a *pending suit* on the 3d March, 1875, when the act of 1875 was passed. It is true that the final decree of the chancery court was reversed on the 21st May, 1877, and the cause remanded for the taking of an account, but that could hardly make any difference: *the suit was pending nowhere in* 1875, nor could it be said to be a suit brought *after March* 3, 1875. The act of congress manifestly contemplated that applications for removal of all *pending cases* should be made at the first term of the state court held after the passage of the act. Removal Causes, 100 U. S. 473. Bible Society vs. Grove, 101 U. S., 610. And this fortifies our objection to the removal in this case. The defendants had experimented on their defense in the state courts, had met with the unexpected difficulty of an adverse decision, and then undertook to stop the proceedings and take their case to courts of the United States. This is hardly to be tolerated. *Ib.*

In this case the *mandate* filed remanded the cause "for an account to be taken in accordance with the views contained" in the opinion of the supreme court of Mississippi. And while it is true that the final order of the supreme court was *afterwards modified*, this modification is no part of the record in this

cause. The amended decree was never filed in the chancery court of Washington county, nor in the circuit court of the United States, for the southern district of Mississippi; and *the removal of the cause* was actually made long before the order was known to exist by the solicitors for the appellants. We do not think this order filed for the *first time* in this court can avail the appellees. P. R. 47. If the parties desired their record to be amended, the act of congress provided a remedy by *certiorari*.

If, on the appeal, the decree below had been reversed, and the cause sent back for a rehearing, it is admitted that for the purposes of the acts of congress, of 1866 and 1867, the final hearing would not have begun until the court below had again entered upon the determination of the case. "The reversal would have perfected the right to a second hearing in the court of original jurisdiction, and, under the rule stated in *Vannevar vs. Bryant*, 21 Wall, 41, a demand for the transfer might properly be made." But when no new hearing is granted, and there is a *decree on the merits under the original submission*, the rule is different even under the acts referred to. The supreme court of Mississippi decided the controversy so far as the primary rights of the parties were concerned, and sent the case back to be referred to a master to settle the details of a final decree after the making of a formal amendment. *Jifkins vs. Sweetzer*, 102 U. S. 179, 180; 28 Mich., 527; Dillon, Removal of Causes, 28.

But we do not think that the decisions under the acts of 1866 and 1867 as to removals after a trial had and a new trial granted, which are relied upon by opposing counsel, can be applied to the act of March 3, 1875. That act applies only to *cases pending at the time, or brought after* the passage of the act, and cannot, by any strained construction, be made to apply to this cause, every principle involved in which had, as we think, been fully settled; and the only thing remaining to be done being a formal amendment conceded to be true, and the taking of an account. The merits of the contest had been reached and settled; and the whole policy was to get the case in a different forum where it was hoped the rules prescribed by the supreme court of Mississippi might not be followed. In other words, to make a new experiment before even any amendment in the pleadings under the order of the supreme court of Mississippi had been made

The petition for removal does not show that Pearce was a non-resident of the state when the *bill was* filed originally. The learned district judge decided that it was necessary to allege and prove, that, at the time the suit was commenced, Pearce was a non-residenl of the state. If Pearce were in fact a resident and citizen of the state when the suit was *commenced*, clearly the petitioners were not entitled to a removal of the cause. The courts of the United States could not acquire

original jurisdiction *prior* to the act of 1875, of such suits, even if Pearce had been a non-resident. None of the parties were in the state of Mississippi; they were all non-residents; and the suit could not possibly have been begun in the courts of the United States *under* the act of 1875. This act was not intended to give jurisdiction when it could not possibly have attached in the first instance under the constitution and laws of the United States. Else all one would have to do to give jurisdiction to the United States courts in such cases, would be, to begin in a state court, call parties in by *publication*, and when appearance was secured, apply for the removal. The presence of the defendants within the jurisdiction at the time of suit brought would thus become a very unimportant circumstance though lying at the foundation of all jurisdiction.

We think, therefore, that the motion to remand the cause should have been sustained and not overruled. See Insurance Company vs. Pechner, 95 U. S., 183.

II.

But the court erred in sustaining the demurrer to the amendment filed under the order and judgment of the supreme court of Mississippi. The case as decided is fully reported in 54 Mississippi, p. 467, *et seq.;* and we respectfully suggest that these points in the case were determined and adjudicated, upon a hearing on pleadings and proofs:

1. Where expenditures have been made for the benefit of the trust estate, and it has not paid them, directly or indirectly, and the estate is indebted to the trustee, or would have been if the trustee had paid, or would be if he should pay the demand, and the trustee is insolvent, or non-resident, so that the creditor cannot recover his demand from him, or will be compelled to follow him to a foreign jurisdiction, the trust estate may be reached directly by a proceeding in chancery.

2. Where creditors *cannot get payment from the trustee*, and *it is right for the trust estate to pay the demand, and it would owe the trustee, if he should pay the demand*, they may be substituted to the exact position which the trustee would occupy if he should pay the demand and seek to obtain reimbursement out of the estate.

3. The reason why insolvency of the trustee is an element in the combination of circumstances, admitting the creditor to proceed against the trust estate, is *because of the inability of the courts to coerce an insolvent person to pay his liabilities*, and the same considerations apply ordinarily in case of the non-residence of the trustee without regard to his pecuniary condition.

4. Debts properly made by Vick, agent and co-trustee, in the management of the trust property, were the debts of Pearce, the trustee, with this qualification, that he was exempted from

responsibility personally for the acts and conduct of Vick.

5. The debt sued on is an account stated, and was recognized as just and proper by Pearce, the trustee, who explained its existence to the beneficiary, when a settlement was made with him, upon the distinct recognition of the idea that he was free from all liability and concern for the trust estate, and that the beneficiary received the estate from him charged with all its liabilities in his hands. This created an equity in favor of Pearce which must inure to the complainants.

6. If Pearce had paid the demand sued on, he would have been a creditor of the estate to that extent.

An analysis of the reported cause will show that the supreme court clearly adjudicated that the debt sued for was, under the trust deed, the debt of Pearce with the qualification stated; that if he had paid it he would have been a creditor of the estate and entitled to subject the same to its payment; that the non-residence of Pearce entitled the creditor to proceed directly against the estate; and that the equity in favor of Pearce created at the time of the settlement with him, under and by the agreement that the liabilities which had been incurred on account of the trust estate, should be met by the beneficiary—should be realized by the complainants. This settles every question involved; and had the bill anywhere charged that Pearce was a *non-r sid nt* the whole case would have been finally adjusted by the supreme court of Mississippi. It was remanded for this amendment and then for an account, and the case was removed to the circuit court of the United States, we believe, because of the known adverse opinion of the district judge rendered in other similar cases. Is the decision of the supreme court of Mississippi the law of this cause? We think there can be no doubt of it.

Williams vs. Kirtland, 13 Wall., 306;
Nichols vs Levy, 5 Wall., 433;
Elmwood vs. Marcy, 92 U. S., 289;
Montgomery vs. Samory, 99 U. S., 482;
Miles vs. Caldwell, 2 Wall., 35;
Ross vs. Doe, 1 Peters, 655.

Recurring to the decision of the learned district judge, it will be seen that the complainants are absolutely shut off from all remedy. Vick is dead and Pearce is not *personally* responsible for his debts even when contracted for the benefit of the trust estate, though they became the debts of Pearce *as to he estate*, by the provision of the deed itself. The view presented is this: The trustee could only claim against the estate the balance due him after discharging all his liabilities to the estate; this balance could only be established by a settlement of all his trust accounts under proper proceedings against the *cestui que trust* when he has surrendered the estate; and the creditor seeking relief through the rights of the trustee must pursue the same course; he must allege that there is a balance due the

trustee and seek an account to establish that balance by proper proceedings; the beneficiary in the deed cannot be called upon to respond until the balance is shown to be due, the burthen of showing which is upon the creditor; the two trusteeships are in no way blended together and the complainants must allege and prove an indebtedness from Vick to the estate upon a settlement of his accounts as trustee; or from Pearce to the estate if intending to reach the estate through him; and they must allege and prove that, at the time of commencing the suit, Pearce was a non-resident of the state or insolvent.

Such is the opinion of the court below and by it we are required to do an impossible thing. How can we state Pearce's account or Vick's accounts running through a series of years without a voucher or any memoranda? What becomes of the provisions of the deed under which the defendants claim the property? Does the instrument mean nothing when it says that Vick should be regarded as co-trustee; that *as agent for Pearce, trustee, and as agent and trustee for Sarah Vick during her life, and as agent and trustee for her children after her death, he should superintend, possess, manage and control the property for the benefit of all concerned?* The supreme court of Mississippi said this deed conferred very large powers for incurring expenditures, and that Vick was thus constituted the agent of the trustee for the very purpose of possessing, managing and controlling the trust estate. The district judge says that the two trusteeships are in no way blended together. The deed directly contradicts this, as construed by the court of last resort in Mississippi; the debts properly made by Vick, agent and co-trustee, in the management of the trust property, *were the debts of Pearce, and we may add the debts of Sarah Vick herself.* The law of the case is thus wholly ignored, and the absolute provisions of the deed nullified.

An examination of the amendment to our bill, made to meet the decision of the supreme court of Mississippi, will show that it is clearly charged thereby as follows:

1. That the claim sued on consisted of necessary plantation supplies for the plantation and slaves included in the trust deed, and payment of necessary expenses incurred in the management thereof by the said Vick and Pearce, trustees under the deed.

2. That Vick died in April, 1861, and Pearce at once succeeded to the management and possession of the plantation and slaves.

3. That Pearce was a non-resident of this state and was a non-resident thereof when the first amendment to the bill was filed in the chancery court of Washington county; and was insolvent when made a party to this cause.

4. That the trust estate got the full benefit of the supplies and money advanced by complainants and has not paid said indebtedness directly or indirectly, and had said Pearce paid

complainant's debt, the trust estate would have been indebted to him in the full amount threof.

5. That Pearce surrendered the estate upon the agreement and understanding that complainant's debt would be paid by the shipment of the crop of cotton then growing on the trust lands, which was not done by Phelps and wife, and but for this agreement the trustee never would have surrendered possession of the trust estate; and

6. That the payment of complainant's debt by said Pearce would have entitled him to charge the same upon the trust estate under the provisions of the trust deed exhibited with the bill.

We respectfully suggest that this amendment, taken with the original bill, presented our cause fully up to the rules prescribed by the supreme court of Mississippi, and even to the extent of the decision made by the court below, *if it be conceded that, under the trust deed, the debt sued for was Pearce's debt.* We admit that it does not tally with the opinion of the district judge, without this concession, and we insist confidently, that his opinion is at variance with the most approved adjudications as applicable to the case at bar. It stands to itself and we do not think is maintainable.

In the opinion of the circuit court we are bound to state an account for the several trustees and allege and prove a balance upon a general accounting of both or either. When this is done, we recover only to the extent of this balance. We do not believe this to be the law, without reference to the decision made in this case by the supreme court of Mississippi, nor that the principle of subrogation applies to the precise question involved here. It must be borne in mind here that Vick, agent and co-trustee, died in 1861, and that Pearce succeeded to the possession and management of the trust estate, and has always acknowledged the justice of our claim. We admit that trustees are personally liable on contracts entered into by them for the benefit of the trust estate, in the absence of an express provision in the agreement to the contrary, and that ordinarily they cannot by contract bind their beneficiaries, or the trust estate. But here, Pearce, by the terms of the deed, was not personally liable for the debt created by Vick as his agent and trustee, and which *quoad* the estate is a debt binding upon him,so that if he recognized and paid it, his accounts would have been entitled to a credit, without reference to the state of Vick's account, who was dead.

It must be conceded that when goods are supplied to an estate at the request of the trustee, the creditor usually considers the solvency of the estate, and not the solvency of the person with whom the contract is entered into. The trustee is regarded merely as the agent of the estate, which is supposed to be liable for the goods supplied; indeed in this cause Vick was, by the deed, constituted the agent of the trustee, Pearce,

and the agent and trustee of Sarah Vick and her children. So that the agency is stamped upon the face of the deed itself. The expenses of a trustee in the execution of the trust are said to be a lien upon the estate, so far that he cannot be compelled to part with the property until his disbursements are repaid. Certainly if he purchased necessary supplies *and paid for them* he would be entitled to be reimbursed out of the estate in his hands. Perry on Trusts §§ 907–910. But suppose that, after buying and using the goods, *the trustee refused to pay for them and is arrears to the estate*, has the creditor any mode of collecting his debt except by a proceeding against the trustee? If the trustee is *solvent*, ordinarily he alone can be proceeded against, unless there be a stipulation in the deed under which he holds exempting him from personal liability as in this case. The creditor is thus fully protected, and the trustee is accorded a lien upon the estate for his indemnity. No other remedy is necessary. But when the trustee is insolvent, and the contract enures to the benefit of the estate, and the beneficiaries refuse to pay, the case would seem to be different. It is certainly against right and justice that the creditor should be remediless, if the contract was necessary in the administration of the trust and the estate has received the benefit, thereof. Herein lies the necessity for working out an equity in his behalf. It has hence been held in several States, that where the trustee is insolvent, and a contract has been made with him which was necessary and proper in the administration of the trust, and of which the estate has received the benefit, the creditor may proceed against the estate itself to enforce payment of his demand without reference to the state of accounts between the trustee and the estate. This right arises by operation of law, it is said, and proceeds upon the principle of natural equity that a benefit given at request ought to be paid for, unless it was understood to be a gratuity from the beginning.

Cater vs. Eveleigh, 4 Desauss, 19;
James vs. Mayrant, Id., 591;
Montgomery vs. Eveleigh, 1 McCord. Ch., 267;
Magwood vs. Johnston, 1 Hills Ch., 228;
Gaudy vs. Babbitt, 56 Ga., 640;
Tennant vs. Storey, 1 Rich. Eq. 223–243;
Wylly vs. Collins & Co., 9 Ga., 223;
Frost vs. Shackleford, 57 Id., 261;
Ferrin vs. Myrick, 41 N. Y., 315;
Norton vs. Phelps, 54 Miss., 472;
Owens vs. Mitchell, 38 Texas, 588.

The district judge who decided against us on the demurrer, says that we can only be *subrogated* to the right of the trustee. P. R. 44. If this be so every suit by a creditor would, as he held, either involve an examination of the multitudinous accounts of a trust estate, or, if there had been a judicial

settlement of the accounts of the trustee, compel the creditor to be bound by a proceeding to which he had not actually been made a party. Practically it would amount to "a repudiation" of the whole doctrine which allows a creditor to look to the trust estate in any event. What effect could the *insolvency* of a trustee have where he is largely *in arrears* to the estate, in this point of view? When he is insolvent and refuses to pay the creditors, he is usually in arrears with the estate which he is administering; and to *subrogate* a creditor to his rights would be a vain thing. He would only have the privilege of making a laborious settlement without the means adequate to the task, for the purpose of disclosing the utter vanity of the whole proceeding in so far as his real interests are concerned.

But the "subrogation" theory proceeds wholly upon the idea that the trustee has obtained a *lien* on the trust estate, which is capable of being transferred by him, or the courts, to the creditor. This view is neither logical nor just. The trustee has no *lien* because of his making a contract beneficial to the estate which he represents. He has an "inherent right to be reimbursed all expenses properly incurred in the execution of the trust:" and the possibility of acquiring a lien by an actual advance of money for the estate. This is a right peculiar to the trustee—a personal right not assignable—and one which cannot arise before the *actual payment of the money*. So that when the trustee has not paid, and refuses to pay, a debt legitimately contracted by him in the proper execution of his duties, the creditor has no chance of a recovery in case of his insolvency, if the *subrogation* theory be true. Manifestly, in speaking of the right of the trustee to reimburse himself as a test of the creditor's right against the estate, the courts must have meant to designate the kind of transaction in which a recovery could be had. The reason is apparent. The so-called lien of the trustee on the estate for advances does not arise until an advance is made; and the very act which creates or gives rise to the right would do away with all occasion for subrogation in favor of the creditor whose debt has been paid. The court below says the creditor has no rights against the estate when the indebtedness of the trustee to the estate exceeds that of the estate to him; and this is true if the right of the creditor be one purely of subrogation.

An illustration in point may be stated. An insolvent "trustee" largely in arrears to an estate consisting of a plantation and a large number of slaves, early in 1861, applied to a merchant in Louisville, Kentucky, for pork, clothing and shoes for the use of the slaves in his possession and for the money to pay taxes on the trust lands occupied and cultivated by them. The merchant knew he was insolvent and in arrears to the estate, and only consented to make the advance upon the faith of the trust property, and the provisions of the deed under which he acted, which stipulated that he was to be the *agent of the trustee*

holding the legal title to the property, and the agent and trustee of the grantor in the deed during life, and agent and trustee of her children after her death. The supplies furnished were actually consumed by the slaves. Will it be contended that the creditor has no rights in such case? On the contrary, is it not true that he has a right to look to the trust estate because of the facts stated? If this is not so it would follow that an insolvent trustee without money and in arrears to the estate he represented could make no contract whatever. If he had possession of slaves he could not feed them or clothe them because he had no credit personally; no money and no right to bind the trust estate. The court in Wylly vs. Collins & Co., *supra*, answered this position thus: "But if this modern principle is to be understood as maintaining that, when the trustee, *in this class of trusts*, is in arrears to the trust estate, the creditor who has furnished articles for the use and benefit of the trust estate, and which are necessary and proper for it, is not entitled to payment, unless the trust estate is in debt to the trustee, so that the creditor may be subrogated to his rights —equity making that party responsible at once, on whom the burden must ultimately fall—we are compelled to withhold from it our assent. We cannot subscribe to the proposition that the equity of the creditor depends upon the fact of whether or not the trustee is in advance or in default to the estate. It rests, we suppose, upon an entirely different principle. Humanity to trust estates—the necessity of the case—forbid, in our judgment, the establishment of such a principle.

"The trustee may be delinquent for thousands for past mismanagement; that, however, cannot deprive the trust estate of things necessary and proper for subsistence. And suppose my agent has received and squandered my effects, are third persons to suffer on that account? It may constitute a very good reason why he should be removed, and a more faithful steward substituted in his place, but it cannot justify the withholding payment from the creditor who has fed and clothed me and administered to my wants."

See R. M. Charlton's Rep., 376;
Poole vs. Wilkinson, 42 Ga., 539;
Noyes vs. Blakeman, 6 N. Y., 567.

In Ferrin vs. Myrick, 41 N. Y., (2 Hand,) 325, the court say: "It ought to be added that, in case of fraud or insolvency of the executor, an equitable cause of action would probably be thereby created against the estate, which could be enforced on behalf of the creditor, and which would enable him to maintain a claim against the estate directly." There is, also, a clear distinction between the cases of administrators, executors and guardians, and trustees holding property under deeds or wills, conferring express powers, which, if regarded, would explain the great majority of the cases apparently militating against our view. And the peculiar character of the trust property

in this case—slaves and lands—would rather take it out of the operation of the general rule. R. M. Charlton, *supra*; Douglas vs. Executors, etc., 2 McCord, 105; Lewis vs. Harris, 4 Met., Ky., 351.

In Worrall vs. Harford, 8 Ves. Jr., 8, the general doctrine was announced that persons dealing with a trustee must look to him, and in that case Lord Eldon said he doubted very much and desired not to be understood to admit, that even if the trustees are charged not to be solvent, creditors may come upon the fund; but he stated that *particular cases may be excepti ns.* That decision was made in 1802 and was afterwards cited in England; but the question involved, or suggested, has there attracted no further attention.

In Cater vs. Everleigh, 4 Desauss, *supra*, the husband, acting manager f r the trust estate of his wife, purchased a saw gin to gin the cotton crops of the trust estate, and gave his note for it. He was insolvent and the creditor filed his petition to make the trust estate liable for payment of the debt. The court overruled a demurrer to the petition, and held that the trust estate was liable because the gin was bought for it, belonged to it and had not been paid for.

"It is just," say the court, "that the complainant's demand should be satisfied out of the estate." This is the settled law in Georgia and is sustained by the cases heretofore cited in this argument.

An examination of the cases which seem to conflict with the views we here endeavor to maintain will develop the fact, that, almost without exception, they relate to contracts made with administrators, guardians and executors, and not to trustees holding under deeds conferring powers to "superintend, possess, manage and control the trust property," which is always to "stand charged for the payment of such amount as may be necessary for the liberal support and maintenance of the" *trustee's agent*, and the proceeds of which were to be bound first for the support of the plantation, slaves and family. There is good reason for the rule that the creditor shall not reach the heirs' property because of a contract with the administrator. Clopton vs. Gholson, 53 Miss., 470, presents forcibly the propriety of this rule, and it was discussed in Fearn vs. Mayers, 53 Miss., 458, when the *agent of the trustees* holding property under a deed by the owners, undertook to subject the trust property to payment of his debt. In the latter case the right of the *agent* to proceed directly against the estate was denied, *because of the fact that he was employed by the trustee and not appointed by the owner or beneficiary.* In the former, because executors and administrators have no authority to contract debts which shall primarily bind the estates committed to them. But even in that case, it was said that if the creditor can show that the consideration of his demand inured to the benefit of the estate, and is unpaid; that the administrator is non-resident or insolvent;

has never received credit for it in his settlement; and that the estate is indebted to him,—he could have himself subrogated to the rights of the administrator against the estate, and to that extent have satisfaction of his demand. And it was further adjudged that it would not be necessary for the creditor to show that the estate was actually indebted to the insolvent administrator; it would be sufficient to show that the estate would have been indebted if the administrator had paid the demand out of his private funds. Page 472. But see Woods vs. Ridley, 27 Miss., 119, and Short vs. Porter, 44 Miss., 533. The court thus assimilates the remedy to an equitable garnishment, because it could not be said that a creditor holding an unsatisfied demand could be *subrogated* to the trustee's rights against the estate, when the right on the part of the trustee to reach the estate could only arise by an actual *payment* of the demand.

III.

The court erred in sustaining the demurrer to our last amendment filed. P. R. 37, 38, 39. It is believed that this amendment is all that could have been exacted. It details the whole transaction out of which the debt originated, and by which, under the deed, it became and was admitted by Pearce to be the trustee's debt. It alleges that the debt was for taxes paid, and clothing and supplies of subsistence for the slaves of the trust estate, all of which were applied to the use and benefit of the trust estate. It states that had Pearce paid said debt he would have had the right to charge it against the estate, and the balance due to him by said estate would have been, and would now be, equal to complainants' debt, exclusive of all other items allowed and paid by Phelps and wife. It sets up the agreement referred to in the opinion of the Supreme Court of Mississippi, delivered in this very case, and relies upon the equity thereby created. It alleges that on the 21st February, 1871, and before that time Pearce was and still is a non-resident of this state; that he was insolvent when he took and surrendered possession of the trust property and settled his accounts, and when the original bill was filed he had no means or property out of which the complainants' debt could have been made, and that he had no means or property in the state of Mississippi of any kind when made a party to the proceedings. It alleges that when the said Sarah Vick was executrix Henry W. Vick was insolvent and continued so to be up to his death. The demurrer was sustained because the Court said the debt was a personal liability of Vick and not a debt of Pearce through whom it is sought to reach the estate; but the amended bill charges that Pearce assumed and acknowledged the debt to be his debt, and under the deed of Sarah Vick the debt was the debt of Pearce. 54 Miss., 473. We, therefore, insist that the demurrer to this amendment should have been overruled. Lest

the court should think strangely of the course pursued in amending the bill in this case, we may remark that it follows the course of practice in the chancery courts and the circuit courts in equity within the state of Mississippi, and has the advantage of saving costs and preventing prolixity in pleading.

WM. L. NUGENT,
Attorney for Appellants.

NOTE.—I have been greatly aided in the preparation of this brief by an article in the July, 1881, number of the American Law Review, by Louis D. Brandeis, Esq., entitled: "Liability of Trust Estates on Contracts made for their benefit;" and respectfully refer the Court to the article itself as constituting a masterly presentation of the question discussed. I append copy of the first amendment made in the circuit court of the United States, which was lost and has been supplied; but which is not found in the printed record:

IN THE CIRCUIT COURT OF THE UNITED STATES,
For the Southern District of Mississippi, in Equity:

HEWITT, NORTON & Co., }
264 vs. } January, Special Term, 1880.
A. J. PHELPS, et al. }

On the application of complainants' solicitors, it appearing to the satisfaction of the court, that the amendment to the bill in this cause filed under the leave contained in the order of the supreme court of Mississippi, on the 11th day of February, A. D. 1878, has been lost; and the solicitors for complainants having thus tendered to the court, a substantial copy of said amendment, accompanied by an agreement of the counsel for defendants. It is therefore ordered, adjudged and decreed, that the said copy be filed, in the place of the said original amendment and held and taken as a supply of the said lost record; and it is further ordered, adjudged and decreed, that a copy of the said amendment, with this order, be certified by the clerk of this court to the supreme court to supply the loss in the record heretofore sent up. Ordered, adjudged and decreed, this 2d February, A. D. 1880.

R. A. HILL, Judge.

IN THE CIRCUIT COURT OF THE UNITED STATES,
For the Southern District of Mississippi, in Equity:

HEWITT, NORTON & Co., }
vs. } No. 264.
A. J. PHELPS, et al. }

And now come the complainants, and under the leave contained in the opinion and order of the supreme court of said State, in said cause, and by leave of this court amend their bill in this cause by adding thereto prior to the prayer thereof these allegations:

"The claim sued on here consisted of necessary plantation supplies for the plantation and slaves included in said trust deed and the payment of necessary expenses incurred in the management thereof, by the said Vick and Pearce, trustees under said deed. The said Henry W. Vick departed this life in April, 1861, and the said Jona. Pearce at once succeeded to the management and possession of the said plantation and slaves. The said Jona. Pearce is a non-resident of this State, and was a non-resident thereof when your orators' first amendment was filed in the chancery court of Washington county. He was also insolvent at the time he was made a party defendant hereto under the order of the said chancery court of Washington county. Had the said Jonathan Pearce paid your orators' said debt, the trust estate would have been indebted to him in the full amount thereof. He surrendered the possession of the trust property to the *cestui que trust* upon the agreement and understanding that your orators' said debt would be

paid by the shipment of the crop of cotton then growing *on the trust lands*, which was not done by the said Phelps and wife. The said trust estate got the full benefit of the supplies and money advanced by your orators and has not paid the indebtedness directly nor indirectly. But for the engagement on the part of the *cestui que trust* to pay your orators' said debt, the said Pearce would not have surrendered possession to her and her husband; and the payment of your orators' debt by said Pearce would have entitled him to charge the same upon the said trust estate under the provisions of said trust deed and enforce payment thereof out of said trust property." And your orators pray as praved in their original bill.

W. L. NUGENT, Sol.

We consent that the above may be filed and substituted for the amendment to complainants' bill filed under order of the supreme court of Mississippi, and that a copy of the same may be certified to the supreme court of the United States to supply defect in the record to that court, occasioned by the loss of the said amendment, of which the foregoing is a substantial copy.

W. L. NUGENT, for Compl's,
FRANK JOHNSTON, Sol. for Def'ts.

I, J. M. MCKEE, clerk of said court, do hereby certify the above and foregoing to be a true and correct transcript of the order of said court allowing the substituted amendment to be filed, and also a true and correct transcript of said substituted amendment.

Witness my hand and the seal of said
[L. S.] court.

J. M. MCKEE, Cl'k.

HEWITT, NORTON & Co., }
vs. } No. 264.
A. J. PHELPS, et al., }

Substituted amendment, filed under leave of court in place of amendment to bill filed February 11th, 1878.

J. M. MCKEE, cl'k.

SUPREME COURT U.S.
FILED
MAR 2 1882
JAMES H. McKENNEY, CLERK

Supreme Court of the United States,

OCTOBER TERM, A. D., 1881.

No. 229.

HEWITT, NORTON & CO.,

vs.

A. J. AND MARY B. PHELPS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

Argument of W. L. Nugent, Solicitor for Appellant, in reply to that filed by George & Clark, Solicitors for Appellees.

Supreme Court of the United States,

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Argument of W. L. Nugent, Solicitor for Appellant, in reply to that filed by George & Clark, Solicitors for Appellees.

1

I do not think the authorities referred to by counsel in their brief recently filed, sustain their argument. In Jifkins vs. Sweetzer, 102 U. S. 177, the application for the removal of the cause was made under the act of 1866, now section 639., sub. 2, Rev. Statutes, and the decision of the court is inapplicable to the case at bar. The petition for the removal of this case was made under the act of 1875, which does not "allow a party to experiment on his case in the State court. and, if he meets with unexpected difficulties, stop the proceedings, and take his suit to another tribunal." 102 U. S. 473. The words of the act of 1875 are: "*now pending.*" If the suit was *pending* when the act went into effect. there is no doubt of the right to remove, unless the other considerations presented in my original brief should be thought a sufficient answer to the claim. Now in suits *pending* when the act of 1875 was passed, it has been repeatedly adjudged that the application for the removal must be

made at the first term of the court thereafter. 102 U. S., 473. Under the act of 1866, the petition was only required to be filed "*at any time before the trial or final hearing*" of the cause, and it was properly decided that where a case was reversed by the appellate court and sent back for a rehearing, the "final hearing" for the purpose of the statute would not have begun until the court had again entered upon the determination of the cause. The right to a *second hearing in the court of original jurisdiction became the test for the right to remove.*

It is quite manifest that the question under discussion must turn upon the proper construction of the act of 1875, and the only inquiry is, whether, within the meaning of that act, this suit was *pending* when the law became operative. I admit that in Nations vs. Johnson et al, 24 How. 205, it was stated that a *writ of error* was said to be a continuation of the original litigation rather than the commencement of a new action, but that does not advance us in the effort to reach the *meaning of the act of Congress.* Judge Dillon says, that the decisions under the acts of 1866 and 1877, as to removals after one trial had and a new trial granted, may not be and probably are not applicable under the act of 1875. Removal of Causes, 3d edition, p. 28, § 23, and p. 84, § 67. Sims vs. Sims, 17 Blatchford 370, was a case removed under the act of 1866, and the petition and affidavit were filed before "the trial or final hearing of the suit." The learned judge held that the act of 1866 was not *repealed by that of 1875 and hence overruled the motion to remand.*

When, before the passage of the act of 1875, a cause *was pending upon a motion for a new trial* which was overruled and judgment rendered, and that judgment was reversed on writ of error and the cause was remanded for a new trial about a year after the passage of the act of 1875, a petition for removal filed at the time the suit was remanded, was held to be seasonably presented in Kauffman vs. McNutt, 3 Cent. L. J. 408. The reason for this decision is apparent. The cause was *actually pending* when the act was passed, and if the motion for a new trial had been granted, as it should have been, the right to the removal of the cause would have been complete. The substantial rights of the litigant could not be cut off because of an error on the part of the judge. But in Young vs. Andes Ins. Co., Id. 719, Judge Swing held that a removal could not be made, under the act of 1875, of a suit pending in a state court at the time of the passage of that act, in which a trial was had after such passage,—though the verdict was set aside and a new trial allowed, and the petition for removal was made at the first term at which the second trial could have been had. The true test as to the application of the statute is, did the case stand for trial at the time of the passage of the act, and was it removed at the first term of the court at which it could be tried after such passage?

Mer. & Man. Bank vs. Wheeler, 3 C. L. J. 13.

Hoadly vs. City & Co., San Francisco, 8 Chi. Leg. News, 1346.
Andrews Ex. vs. Garrett, 2 C. L. J., 797.
Ames vs. Col. Cen. R. R. Co., 4 Dillon 260.

The case of Gaffney vs. Gillette, 4 Dillon, 264, seems to be a conclusive authority against the contention of counsel. There the decree below was reversed by the supreme court and the cause was remanded to the proper district court of Colorado, with leave to complainants to amend their bill if so advised. The bill was amended and a demurrer was filed to it, and yet the application for removal was denied because made too late. Indeed, I respectfully submit that the statement of the law on this subject by Judge Dillon is correct: "Causes *once tried but in which a new trial has been ordered, and which was pending, ready for retrial when the act took effect, are removable, if the application therefor be made after the passage of the act, and within the time therein required.*" Removal Cause, p. 84, § 67. I do not well see how, otherwise, the cause could be said to be pending. *Railroad Company* vs. *McKinley*, 99 U. S., 147, does not contravene this view, because the question at issue was neither raised nor decided in that case; it was simply held that the supreme court of Iowa had jurisdiction of the cause at the time the petition for removal was made, and hence that the attempted removal was fruitless. These statutes for the removal of causes are to be *strictly construed*, though, I concede, they should have a fair and reasonable construction. The precise question in the case at bar has never been mooted or settled, as far as I know. It would appear that the words "*now pending*" relate to suits in courts of original jurisdiction which, at the time of the act, remained undecided. Certainly it cannot be said that the mere reversal of a case by an appellate court, after the passage of the act of 1875, could extend the operation of the act and give jurisdiction which could not otherwise exist. Congress could well have covered the cause at bar by the addition of the word "hereafter," after the word "now," and before the word "pending;" but it was not done. The words used are "now pending" or *hereafter brought*.

2.

I insist that the decision of the supreme court of Mississippi in this case, as to the construction of the deed of Sarah Vick, must be controlling, under the repeated adjudications of this court. It was rendered in a controversy between the parties to this suit, and there is no reason why it should not control the case in all after proceedings. With this view, I beg leave, respectfully, to correct some views presented and statements made by counsel. Counsel are mistaken in saying that when the case was before the supreme court of Mississippi, there was no evidence outside the pleadings and exhibits. Brief George & Clarke 5, record 30, 47. The cause was heard by the chancellor on bills, answers and proofs; the proceedings were

plenary, and the evidence took the wide range suggested by the pleadings. That evidence is not here now, and properly. The cause went off on demurrer to the original and amended bill, and the evidence cut no figure in the decision of the court below. I do not choose to comment on the statement that the supreme court of Mississippi made a "curious decision." It is *self-correcting.*

It is said that our right to sue the trust estate must be determined as of the date of the commencement of the suit; but if that be true, the petition *for removal* should have fixed the status of the parties *at the same time*, else it should have been disallowed. The fact is, that Pearce, when made a party to the suit, was a non-resident; whether he was a non-resident before I do not know. He was not a party to the original bill; he was only made a party when the chancellor sustained a demurrer on this ground. Up to that time it was supposed he was not a necessary party, reliance being placed upon the trust deed of Mrs. Vick alone, as taking the case out of the operation of ordinary rules.

I do not conceive that the dissertation of counsel as to the rights, duties and powers of guardians under the laws of Mississippi is of any avail in this cause The rights of the parties are to be determined by the *trust deed of Sarah Vick in connection with the facts admitted by the demurrer.* Pearce was the trustee, in law and in fact, after the death of H. W. Vick; and, upon Vick's death, he was *legally* trustee, and Vick was *his agent, and agent of all the beneficiaries touching the superintendence, possession, management and control of the trust property.* R 3, 7. The extent of his capacity to contract debts binding upon Pearce was suggested by the supreme court of Mississippi. Words could not have been apter to give authority or bind the estate or its income. Pearce did not take possession of the trust property as *guardian* but as *trustee.* He was acting in both these capacities,—and his settlements were as *trustee and as guardian.* Indeed, I respectfully submit, that the probate court really had no jurisdiction of the property whatever, nor of the trustee. That jurisdiction properly appertained to the chancery court of Washington county. Vick's debts, contracted in the *management of the property*, were Pearce's debts. He acknowledged them, and the beneficiary *agreed to pay them as the condition upon which the trust estate was surrendered to her.* The equities of the case have been discussed elsewhere.

The supreme court of Mississippi, in this very case, adjudged that the debt of appellants was not barred by limitation; nor is Floyd vs. Pearce, 57 Miss., 140, adverse to that conclusion. A moment's notice would have shown the learned counsel the difference. In this case, there was a *formal statement of the account by Pearce*, a distinct *written* recognition and admission of its entire correctness by him in his final report, and a dis-

tinct admission thereof by the beneficiary coupled with an agreement to pay it *out of the cotton then growing on the trust estate.* Floyd vs. Pearce, *supra*, decided that a *verbal acknowledgment* of an account's correctness, making it an account stated, will not avoid the statute of limitations under the Revised Code of Mississippi, of 1871, § 2165.

I may freely venture to affirm, that there can no decision be found, *anywhere*, which announces that a clear and distinct *written recognition and admission of a debt, signed by the party to be charged*, coupled with a *quasi* promise to pay it, amounts to nothing in respect to the law of limitations; and I should think I had affected learning to quote authorities on the point.

W. L. NUGENT, Sol.

FILED
JAN 30 1882
JAMES H. McKENNEY, Clerk

Supreme Court of the United States.

OCTOBER TERM, A. D., 1881.

No. 229.

HEWITT, NORTON & CO.

vs.

A. J. AND MARY B. PHELPS.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

ARGUMENT BY J. Z. GEORGE AND CHAS. W. CLARKE, SOLICITORS FOR APPELLEES.

JUDD & DETWEILER, PRINTERS.

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I.

It is said that this case was improperly removed to the Circuit Court of the United States, because there had been a final hearing and a decree in the State courts. We answer that there was no such decree; the Supreme Court reversed the final decree in the lower court dismissing the bill, and remanded the cause, "with leave to both parties to amend pleadings as they may be advised, and to take testimony, and for an account to be taken in accordance with the views contained in the opinion rendered herein." R. 47.

This was not a finality, but the beginning of fresh litigation. Each party could amend their pleadings. How and to what extent?

Not merely as argued by counsel, on a formal point indicated by the court, but as "the parties might be advised," or in their discretion.

The complainants could make a case manifestly different, and the defendants could set up new defences. We are not to consider on this point what amendments were afterwards actually made, but only the status of the cause as to finality in the decree. When the case was remanded, the bill, answers, cross bill and answers, were all liable to amendment in the discretion of the parties. New grounds of claim, and new grounds of defence could be inserted, by way of amendment, and the result might have been, as in fact it was, that the claim might be made more manifestly illegal. If only an account was to be taken upon the basis that the complainants had a right, established, by the decree, to recover their claim, what need to amend—what good could an amendment do defendants? These questions show clearly the status of the case. It was remanded for a rehearing, another trial, on amended pleadings, and on additional evidence, which either party could take *ad libitum* and was therefore subject to removal.

Jifkin *vs.* Sweetzer, 102 U. S., 179.
Minnett *vs.* Milwaukee & St. Paul R. R. Co, Albany Law Journal, vol. 13, 254.
Crane *vs.* Reeder *et. al. id.*, 15, 103.
Dillon on Removal, 60 and 61.

But it is said this suit was not a pending suit, when the act of 1875 was passed, because it had been decided in the lower court, and no appeal had been taken. We answer the case was then appealable, and when the appeal was taken it was but a continuation of the first suit. This made it a *pending* suit all the time. It was never in a position,

when by an appeal or writ of error, the litigation could not be continued.

Nations *vs.* Johnson, 24 Howard, 195, 205.

II.

It is argued that the opinion of the Supreme Court is *res adjudicata* as to all questions covered by it, and that the circuit court and this Court are bound by its decision.

We deny that what the Supreme Court said in its opinion is the rule of this case, both as to the facts found by it, and the law announced, especially if we can show that its conclusions as to the facts are erroneous, and its rulings as to the law are no longer recognized by it as the law of the State. No such rule has been or can be recognized by the Federal courts in trying removed causes. The reason why the right of removal is allowed, is to substitute trial both as to law and fact in the Federal for such trial in the State courts. The Federal court is to try the case, law and fact, according to its rules, and by its own judgment. If it is *bound* to adopt what the State court said in its opinion, to follow what it has decreed, then the removal amounts to nothing. It would give only a very crippled and impotent jurisdiction. Mr. Justice Grier said, in Pease against Peck, 18 Howard, 599, that—

"Parties who, by the Constitution and laws of the United States, have a right to have their controversies decided in their tribunals, have a right to demand the unbiased judgment of the court. The theory upon which jurisdiction is conferred on the courts of the United States in controversies between citizens of different States, has its foundation in the supposition that possibly the State tribunals might not be impartial between their own citizens and foreigners."

Of course, if the parties had suffered the case to remain in the State courts until it had been finally decided, the decision

would stand in all courts everywhere as the judgment of a court of competent jurisdiction; and, it is for this reason the right of removal does not exist in such a case. The case having been finally decided, there it nothing remaining for the Federal court to try. But when this point has not been reached, and the right of removal exists, if exercised, it will transfer the case, and the whole case, for trial and hearing in the Federal courts.

What force the Federal courts should give, as a matter of comity, to the decision made in this cause before removal, is another question; as is also the proposition that it is the duty of the Federal courts to follow the decisions of the highest State tribunals in their adjudications on the construction of their own constitutions, and their statutes, when they appertain to rights and titles in things having a permanent locality. How far Federal courts will conform their decisions to the rulings of the supreme court of a State is a question that has been frequently adjudicated in this and other Federal courts.

Pease *vs.* Peck, 18 How., 598.
Rowan *vs.* Runnels, 5 How., 139.
Patapsco Guano Co. *vs.* Morrison Trustees, 2 Wood, 404.
Smith *vs.* Shriver, 3 Wallace, Jr., 219.
Blossburg and Corning R. R. Co. *vs.* Tioga R. R. Co., 5 Blatch. R., 387.
Ames *vs.* Slater, 27 Minnesota, 70.

From these authorities we hold that this case comes to the Federal court for *trial in it*, and for *its* decision according to the law of the land, of which the Federal court will judge for itself. More especially as this is an equity case, and as to such the rule is that the equity law of England governs, and not the peculiar system of the State in which the cause originated.

III.

Our next inquiry is as to the law and facts of this case. There was no evidence outside of the pleadings and exhibits, when the case was before the Supreme Court of Mississippi, and there is none now.

That court rendered rather a curious decision. When it discovered this it made a new decree, allowing amendments. The law as laid down in the opinion, except as to the statute of limitation, and as to this, since overruled by the court, is, as we conceive, correct; but it was strangely inapplicable to the facts, as the court afterwards, on reconsideration, confessed, by amending the decree of reversal. The opinion announced the true rule as held in England and most of American States—that the claim of the complainant was against the trustee, and could only be enforced against the estate in subrogation of the trustee's rights, he being insolvent, or a non-resident. But there was no proof of insolvency or charge even of that fact, and no proof or charge that he was a non-resident when the suit was commenced. Hence, according to the opinion, the decree of the lower court should have been affirmed and the case ended; but to supply these essential defects, the court gave opportunity for amendment by reversing and remanding. After the case was removed to the circuit court, an amendment was filed alledging the non-residence and insolvency of Pearce, but confining both these allegations to a date subsequent by one or two years to the date of the filing of the bill, viz., to the date when Pearce was made a party. This will not do. Complainant's right to sue the estate would be determined at the date of the commencement of the suit. A party cannot sue with no right, and afterwards acquire a right and on it maintain the suit. But leaving all this out of the view, suppose that all the facts alleged existed when the suit was commenced, the appellants cannot recover.

According to the deed, Pearce was a *dry*, naked *trustee*, with no power or duty but to hold the legal title for a married woman and her children. The *superintendence*, *possession*, *management*, and *control* of the property was in H. W. Vick, by the express words of the deed. (R. 7.) A trustee's powers are always measured by his duties. Pearce had no duty, and consequently no power to "possess, control, or manage" the estate. All the power was in H. W. Vick. And this is exactly the view which Pearce took of his duties, for on the death of H. W. Vick he at once took out letters of guardianship on the estate of the only beneficiary then living, and managed the estate under the power thus conferred, accounting regularly to the probate court of Washington county, as such guardian of the said beneficiary, (R. 3,) which he had no right to do if he was acting as trustee under the deed.

Hence it follows that whatever he did must be tested by his power as guardian under the laws of Mississippi. In this character he acquired the right to $6,000 for compensation, and he received that sum, when as trustee he would have been entitled to nothing. His powers as guardian, are well defined. He could create no liability against the ward's estate. He was not allowed to exceed the income of his ward. His duty was to preserve, he had no power to destroy or to do any act which might result in the detriment of the estate.

Moore *vs.* Casen, 1st Howard Miss. R., 364.
Scott *vs.* Porter, 44th Miss. R., 364.
Austin *vs.* Lamar, 1st Cus. Miss. R., 189.
Payne *vs.* Stone, 7 S. & M., Miss. R., 367.
Waggle *vs.* Owen, 45 Miss. R., 691.
Dalton *vs.* Jones, 51st Miss. R., 585.

The probate court of Mississippi, as then constituted, was a court of limited jurisdiction, having no power or control of Pearce as trustee under the deed, and if he

acted in that character all his accounting to that court and the allowance of commission were void.

This is unquestioned law in Mississippi. We cull out a few of the many cases. The Probate Court had no power to enforce any right to an estate arising out of contract. It cannot enforce a widow's claim for the proceeds of her dower, sold by the administrator of her husband, and by her consent, and under an agreement that she should have such proceeds.

Hart *vs.* Dunbar, 4 S. and M., 273.

It cannot set aside an assignment for fraud.

Robins *vs.* Norcum, 4 S. and M., 332.

It cannot even enforce payment to the assignee of a legacy or distributee's share in the estate administered.

Hill *vs.* Hardy, 34 Miss., 289.
Dixon *vs.* Houston, 35 id., 636.
Locke *vs.* Williams, 36 id., 187.
Portivant *vs.* Neylans, 38 id., 104.

Nor has it any jurisdiction to try disputed titles to property, even when the estate administered by it is interested in the property.

McCrea *vs.* Walker, 4 How. Miss. R., 455.
Phillips *vs.* McLaughlin, 4 Cus. id., 597.
Clement *vs.* Hawkins, 8 S. and M., id., 339.

It has no jurisdiction to make an order binding an orphan's estate for improvements on his land.

Payne *vs.* Stone, 7 S. and M., id., 367.

It has no power to compel a surviving partner to account; although it is administering the deceased partner's estate.

Scott *vs.* Searles, 5 S. & M., 25; Searles *vs.* Scott, 6 S. & M., 246.

Yet it has full and complete jurisdiction as to all matters confided to it by the State Constitution and laws, among which are matters testamentary and administrative. It had full power to appoint a guardian for Mary B. Vick while a minor, and to have her estate properly managed. She had the whole beneficial estate, and Pearce, the trustee, who had no power as such, was appointed her guardian, hence his powers were those of a guardian, and nothing more, and his acts are to be tested by the law of guardianship.

Blanton *vs.* King, 2 How. Miss., 656.
Carmichael *vs.* Browder, 3 *id.*, 253.
Hammerlin *vs.* Terry, 7 *id.*, 143.
Powell *vs.* Burns, 6 Geo. Miss. R., 605.

Hence all the proceedings of the Probate Court are to be held as applicable alone to Pearce, as guardian; and utterly void so far as they relate to Pearce, as trustee; which, however, does not appear—it being very evident that the Court treated with him as guardian merely.

IV.

If we are mistaken in this, and Pearce had power to act on the death of Vick, then we inquire what were his powers? And what relation did he sustain to Vick, and his administration of the trust estate. If we regard him as adopting Vick's acts, or if Vick was his agent, then in order to ascertain what the supreme court of Mississippi says we must ascertain before we can charge the debt on the estate, we must make out an account embracing all the transactions of *Vick* and *Pearce*, and see how the balance will stand. This, the appellants refuse to do. Supposing, as is correct so far as Vick is concerned, that he was a trustee during his life and that the debt sued on was contracted by him, had Pearce a right to adopt it and make the estate liable for its payment, independent of any consideration as to the state of

Vick's accounts? It is plain he had not. The rights of appellants as against the estate at Vick's death, was that of subrogation to Vick? If Vick had paid; if he could recover; the appellants could. Vick's rights depended on the state of his accounts; if he was a debtor to the amount of the account before payment, then on payment he only discharged a debt which he was bound to do, and he had no claim. If Vick's payment made him a creditor, it must be shown. There is no other way to establish the equity of of appellants.

New *vs.* Nicols, 73d New York, 129.
Patapso Guano Co. *vs.* Morrison, Trustee, 2 Wood, 404.
Story on Promissory Notes, 63.
Lovelace *vs.* Smith, 39 Ga., 130.
Lewin Law of Trust, (7th ed.,) 549.
Thatcher *vs.* Densmore, 5 Mass., 299.
Foster *vs.* Fuller, 6 Mass., 58.
Wallis *vs.* Bardwell, 126 *id.*, 366.
Guerry *vs.* Capers, 1 Baily Eq., 159.
Manigault *vs.* Deas, *id.* 290.
Fearn *vs.* Mayers, 53 Miss., 458.
Clopton *vs.* Gholson, 53 *id.* 456; Hewit, Norton, & Co. *vs.* Phelps, 54 *id.* 467; Tennant *vs.* Storey, 1 Rich. Eq., 223; and Wade *vs.* Pope, 44 Ala., 690.
Jones *vs.* Dawson, 19 Ala., 675.
Worral *vs.* Harford, 8 Vest, Jr., 8.

Pearce had no power to waive the taking of the account of Vick. He was not responsible for Vick's acts and had no duty under the deed with reference to them. (R., p. 3.) He could not settle Vick's accounts; that duty devolved on Vick's legal representative. Pearce's admission, if he made it, of the legality of the account, amounted to nothing. It was wholly *ultra vires.*

If Pearce had paid the account and had claimed a credit

for it on his accounts, he could not have sustained it without showing that Vick's accounts were such as to authorize him to charge the estate with the account. A trustee has not power to impose a liability on the estate, when none existed before, by the mere recognition of an invalid debt.

Thomas *vs.* Bowman, 39th Ills., 426.
" " 30th Ills., 84.
McKissick *vs.* Pickle, 16th Pa. St., 140.
Mayrant *vs.* Guignard, Jr., 3d Strob't, S. C. Eq., 112.
Foster *vs.* Fuller, 6th Mass., 59.

Vick's trusteeship was either wholly independent of Pearce or they were blended in one, contrary to the express terms of the deed. In either view, the decree of the circuit court is correct. In the first view, Pearce had nothing to do with Vick's accounts; and in the latter *all* the accounts of the blended trust must be settled.

V.

The claim is barred by the statute of limitation, and the statute can be taken advantage of by demurrer. See Sheldon *vs.* Northern Line Packet Co., 8th Federal Reporter, 769; Story Eq. Pl., 9th Ed., by Gould, Note 1 to Paragraph 484; Par. 503.

In the opinion of the Supreme Court in this case, their decision was that it is not barred, because the suit was on an account stated; but the case cited by the court, on which they held this view, has since been expressly overruled, as it was most manifestly erroneous, being in opposition to the plain language of the statute; and the rule is now well settled to the contrary in Mississippi.

Floyd *vs.* Pearce, 57th Miss., 140.
Potts *vs.* Hinds, *id.*, 737.

The Court will always follow the latest decisions of the State courts on the subject of the statute of limitation.

In speaking of the construction of this statute by a State court, Mr. Justice Swayne said in Leffingwell *vs.* Warren, 2d Black's (c c), 603, "If the highest judicial tribunal of a State adopts new views as to the proper construction of such a statute, and reverses its former decision, this Court will follow the latest settled adjudication."

United States *vs.* Morrison, 4th Peters.

Green *vs.* McNeil's Lessee, 6th Peters, 291.

This suit was commenced on 17th April, 1869. The last amended bill, and the only one which sets out in detail the creation of the indebtedness, shows as follows:

March	5th,	1861, cash for Vick's draft,	$2,000.00
"	21st,	" " " " "	297.00
April	5th,	" 121 bbls. pork,	2,121.50
"	"	" Plantation supplies,	2,405.93

No credit is shown to have been given on the sale or advances, and interest is charged and calculated from the date of each item. Counting from date of last item in account to 29th of January, 1862, when the statute of limitation was suspended, we have 9 months and 7 days. The statute remained suspended until the 2d of April, 1866, (see Griffin *vs.* Wells, 40 Miss., 611, Winter *vs.* McLean, 43 Miss., 268, and McCutchen *vs.* Dougherty, 44 Miss., 419.) From the 2d of April, 1866, to the 17th of April, 1869, when this suit was commenced against Phelps and wife, is 3 years and 12 days, a longer period by 12 days than requires to bar it under the Mississippi statute, but as Pearce was not made a party until the 21st of February, 1871 (R., p. 12), we have 1 year, 10 months and 4 days longer, making from 2d April, 1866, 4 years, 10 months and 15 days, to which add 9 months and 7 days running before the statute was suspended, we have 5 years, 7 months and 22 days as to

Pearce, against whom it only ceased to run from the time he was made a party.

We have not endeavored to cover all the questions raised, in this brief, as this has been done by our colleague, E. Jeffords, Esq., in a very elaborate and able review of the whole case, to which we call the especial attention of the court.

J. Z. GEORGE,
CHAS. W. CLARKE,
Solicitors for Appellees.

Supreme Court of the United States.

October Term, A. D. 1881,

No. 229.

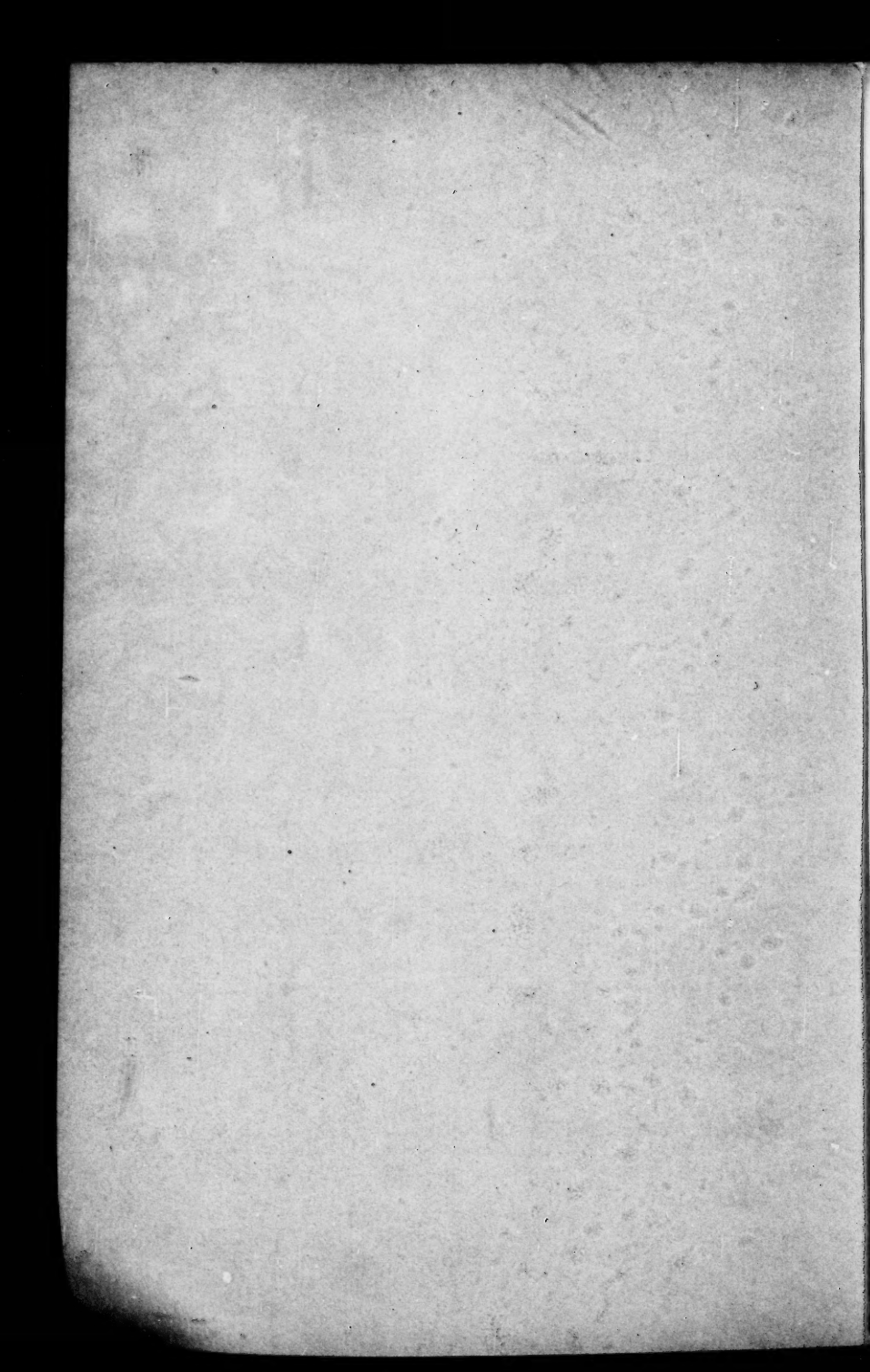
M. O. H. NORTON & CO. Appellants,

vs.

A. J. PHELPS et al. Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

ARGUMENT BY E. JEFFORDS, SOLICITOR FOR APPELLEES



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This cause comes here by appeal from a decree dismissing appellants' first and second amended bills upon demurrer by appellees. And it may be well to give a brief history and statement of the case.

The suit was commenced in the chancery court of the State of Mississippi, by bill filed April 17th, A. D. 1869, against the appellees, A. J. Phelps and Mary B. Phelps, (formerly Mary B. Vick) his wife. The object of the suit was to subject the trust estate of Mary B. to the payment of a debt alleged to have been contracted by trustees. The facts and pleadings were as follows:

By deed dated 1850, Sarah Vick, wife of H. W. Vick, conveyed to Jonathan Pearce a certain plantation in Washington and Issaquena Counties, Mississippi, as well as certain property in Louisville, Kentucky, to be held in trust for the children of said Henry W. and Sarah, of whom the defendant, Mary B., is sole survivor. It is provided in the deed, "that said trustee is to permit said Henry W. Vick, as agent for said trustee, and as agent and trustee for said Sarah Vick during her life, and as agent and trustee for her children after her death, to superintend, possess, manage and control said property for the benefit of all concerned."

The deed then defines the capacity of Henry W. Vick more explicitly as follows: "My intention is that said Henry W. Vick shall be regarded for the purpose of this deed, not merely as an agent, but also as co-trustee, * * and that said Jonathan Pearce is not in any manner to be responsible for the acts and conduct of said Henry W. Vick."

After reciting said deed, the bill avers the death of Vick, (which the exhibits show to have taken place shortly after April 25th, 1861,)

and that Pearce took possession of the estate in June, 1861, and was then appointed guardian of the person and estate of Mary B., the defendant, then a minor. That in October, 1865, Pearce, as trustee and guardian, exhibited to the probate court a final account showing $2768 03 to be due from him to the estate; and at the same time submitted a report representing that the estate was justly indebted to the appellants in a sum of $10,377 80, less a credit of $4076 10, which report is made part of the bill; and wherefrom it appears that the sum of $6145 99 of the said $10,377 80 was contracted by Vick, up to April 25th, 1861, and the residue, $4231 80, by himself; the latter sum being covered by the credits paid to appellants during his own administration, and allowed him by the court in settling his guardian account; still leaving the aforesaid balance of $2768 03 due from him to the estate, and thus leaving the portion contracted by Vick as the subject of this suit. This report recites that Mary B. attained her majority and married defendant Phelps, and the report, together with Pearce's guardian account, was filed November 28th, 1865.

The probate court, as shown in the decree which is made an exhibit to the bill, ignored the report of said indebtedness altogether, but confirmed Pearce's account as guardian; Ex. E, printed record, page 9; and also ignored his character as trustee, and released him as guardian, and allowed him some $6000 for his services as guardian. The defendants were served by publication and did not appear before the probate court. In explanation of the action of the probate court we state that (as the record shows) the said Mary B. was cestui que trust in two other estates of lands and slaves in same county, for one of which her father was trustee; and after his death Pearce took out letters of guardianship as to such property; and therefore, as to his account touching such property the probate court properly assumed jurisdiction, while it properly refused to notice in any manner whatever Pearce's report of Vick's account as trustee; and should not have made Pearce any allowance in his guardian account for services or expenditures touching the other trust estate, because the exclusive forum for settling an account as trustee is the court of chancery.

The bill avers a reconveyance by Pearce to the defendants, with possession. It then avers that said Pearce, as such trustee and guardian, exhibited to the said Mary B., after she became of age and prior to her intermarriage, a statement of said final account and report, and that after proper examination, she "ratified, agreed to and accepted the same, and suffered and permitted the said Pearce to be discharged from the execution of his said trust; whereby the complainants are wholly without recourse as against the said trustee, and are unable through his agency to obtain payment or security for their debt." The bill then avers that on the 3d of October, 1866, they rendered Pearce an account of that date, showing balance of $7631 16, which was admitted by him to be "correct, due and owing," and that the same was exhibited to said Mary B. and A. J. Phelps, who also admitted "the same to be correct, and a legal and proper charge against them, and a liability for which said trust estate was bound."

The bill then finally avers: "That said amount was for supplies and money advanced to H. W. Vick and J. Pearce, trustees aforesaid, for the support and maintenance of said plantation in said county of Washington, and of the said H. W. Vick and Mary B. Phelps;" and claims that the estate "stands charged with the debt in the hands of

the defendants." Prays for an account, &c. A demurrer was filed setting up the statute of limitations, the want of equity in the bill, and other causes of demurrer, and also the non-joinder of Pearce. It was sustained as to the latter point, and in the year 1870 Pearce was made a party defendant to the bill, and required to file an itemized account.

The appellees then filed their answer, denying all of the material allegations of the bill, and especially denying any ratification or recognition of the debt as a claim binding on them, or the trust estate. And Mary B. denied that the account was exhibited to her, as alleged, or that she had any knowledge at any time of what the alleged indebtedness consisted, or that she ever ratified, confirmed, or promised to pay it.

The answer was made a cross-bill, and set forth several defenses, which it is not necessary now to advert to. A final decree was made dismissing the bill, from which an appeal was taken to the Supreme court of the State; and the cause was there heard, and the decree reversed and the cause remanded to the lower court for an account to be taken; whereupon suggestions of error were filed by appellees, and upon consideration thereof the mandate was changed so as to give leave to both parties to amend their pleadings as they might be advised, and to take full proof in the cause.—P. R. 46 & 47.

During the period allowed complainants for an appeal, and before the cause was remanded by the Supreme court, the act of Congress of March 3d, 1875, providing for the removal of causes was passed, and at the first term of the chancery court to which said cause was remanded, the defendants filed their petition for removal to the U. S. Circuit court, which was granted, and the cause duly removed. Thereupon appellants moved the U. S. Circuit court to remand the cause to the State court, which motion was overruled. Appellants then filed an amendment to their bill, as permitted and required by the State Supreme court, which was demurred to and demurrer sustained. Leave to amend again was given, amendment made, a second demurrer filed and sustained, and the bill dismissed.

The first question presented is upon the motion to remand the case to the State court. As will be seen from the petition for removal, P. R. page 31, the complainants were citizens of Louisiana and New York and the defendants were citizens of Kentucky, and the controversy therefore wholly between citizens of different States. The petition for removal was made at the very first moment that it could be made after the passage of the act of March 3d, 1875, being at the first term after it was remanded by Supreme court.

Hoadley vs. City of San Francisco, U. S. C. C. Dist. of California, reported in Chicago Legal News, January 15th, 1876, vol. 8, p. 134. Petillon et al vs. Noble et al, U. S. C. C. N. dist. of Illinois, reported in Law & Equity Reporter, July 4th, 1877, p. 18. Andrews exr. vs. Garret, U. S. C. C. S. dist. of Ohio, Central L. J. vol. 3, p. 281, and vol. 3, p. 13. Dillon on Removal, p. 60, 61.

We assume that the cause stands at issue now upon the original bill as amended. It will be more convenient to discuss it and to consider it in the order of the pleadings.

The principle of law upon which appellees ground their defense is this: That persons dealing with a trustee must look to him personally for payment of their demands, and have no right to resort to the

what restriction would there be to the amount of his support, or any other appropriation of the trust fund. It is manifest, therefore, that the character of Vick must be fixed, in LEGAL contemplation, by the NATURE OF THE DUTIES devolved upon him. Again, the INTENTION of the grantor, Sarah Vick, should be conclusive; and after improperly styling Vick as agent &c. she says in explicit terms: "My INTENTION is that said Henry W. Vick shall be regarded &c. NOT MERELY AS AN AGENT, but also as CO-TRUSTEE," &c. P. R. p. 7. This ought to be decisive of his capacity, and therefore of his independent accountability to the chancery court.

If we are correct in this view, then the appellants' bill should confine its averments to Vick's transactions and accounting alone.

But if the Supreme court were correct in connecting Vick with Pearce as AGENT as well as trustee, then BOTH of their dealings should be embraced in the account to be taken.

Counsel for appellants insist upon confining the account to Pearce's transactions; and even to further restrict it to his GUARDIAN account as already rendered and adjudicated. But what a monstrous proposition it would be to ask that Vick be considered as the AGENT of Pearce for the purpose of CHARGING the estate with debts, and not also considering him an agent for the purpose of giving the estate CREDIT for the revenues derived from it. Vick created the debt, and we say that Vick, as the only one authorized to do so, received the proceeds of crops with which to pay it, and whether received as agent or trustee, the estate ought to be exonerated from a double payment.

The appellants know that Vick is indebted to the estate many times the amount of this debt, and hence their persistent refusal to go into his accounts at all; and because of their evasive pleading in this regard, his Honor Judge Hill promptly sustained the demurrers to the amendments.

Anticipating failure for the want of proper allegations to support the theory of subrogation, the appellants, in their original bill, attempt to fasten the debt direct upon the estate upon several hypotheses.

1st. That the appellees ADMITTED the account to be correct, and a legal and proper charge against them, and a liability for which said trust estate was bound.

2d. That the appellee Mary B. examined the account and report of Pearce, "and ratified, agreed to and accepted the same, and suffered and permitted Pearce to be discharged from the execution of his trust, whereby the complainants were wholly without recourse as against him, and unable through his agency to obtain payment or security for their debt."

The answer denied both of these averments, but for the purpose of the demurrer we assume them to be true, and deny that they show any legal liability whatever.

First as to such an admission: It is too clear that a mere admission of a liability cannot create one. The law defines the liability of a party as it arises from a state of facts, and his opinion or admission does not. See McGrath vs. Bloom, 53 Miss., 250.

We do not dispute that an admission of liability might be competent as EVIDENCE OF A FACT, in support of an allegation that such fact existed; provided the proper foundation was laid for it. For

example, an admission of liability by a debtor who was personally cognizant of the facts, would be evidence to support a count for goods sold and delivered. But it could be contradicted by other evidence, and could not be matter of pleading at all. Or if a defendant, shown to have had full knowledge or information of all of the facts necessary to create an alleged liability, should admit his liability, it might be competent evidence of the facts, subject to rebuttal by evidence of mistake or otherwise. But the necessary facts, which create the liability must be pleaded; and not the admissions, or the circumstances under which it was made, as they would be nothing more than evidence.

In the case at bar, it is not alleged that appellees had any knowledge or means of knowing the correctness of the account shown to them. The account filed with the bill, and alleged to have been shown to them, was not even itemized, but was a balance of account. But waiving that, and say that they examined it and admitted it to be correct, the admission of liability could be evidence only of the one single fact, that the goods were sold and delivered to Vick, or to Pearce through Vick. But that fact would not create any liability against either the appellees or their estate, as we have shown. That liability could only be shown to exist as the result of a general balance in account between the trustee Vick and the estate; and the existence of such a balance must first be pleaded before any sort of admissions by the appellees could be evidence at all, and would then be subject to be rebutted.

The bill does not allege, and it is not a fact, that the appellees had any knowledge or information whatever as to the state of the account between either Vick or Pearce and the trust estate. And even as matter of evidence, upon a proper issue raised, any such admission, or even express promise, or any matter of alleged conduct, would not be permitted to prejudice any cestui que trust ignorant of his rights. Story Eq. Jur. sec. 527a.

Again. The bill does not say to whom the admission was made, but we presume they mean to allege that the account was first rendered to Pearce, and by him shown to appellees. If so, then the admission might be literally and legally true, and still not dispense with the general account we insist upon. That is to say, the account might be correct, and a proper one for ALLOWANCE by the court, as an item in the general account of the trustee, and as such be binding upon the estate. With this construction, the bill should have further alleged a balance of account from the estate to the trustee, and claimed relief therefrom.

Against any theory of ratification we oppose, further, the Mississippi statute which requires the ratification of any contract made during infancy to be in writing, signed by the party to be charged. Rev. Code 1857, page 360, art. 8, as follows: "No action shall be maintained whereby any debt contracted during infancy, or upon any ratification, after full age, of any promise or contract made during infancy, unless such promise or ratification shall be made by some writing signed by the person to be charged therewith." No such writing is shown. Furthermore, such promise must be made to the creditor, or some one authorized to receive payment and give a discharge: and Pearce had no such authority, if the admission was

x to charge any person, upon any promise made after full age, to pay

made to him. See Mayer & Co. vs. McClure, 36 Miss. 389, and cases cited in briefs; also Angell on Lim. sec. 269 and note 7.

Also the disability of coverture of Mary B.

Any act of A. J. Phelps, the husband, would clearly be inoperative to bind his wife's estate, except such as are expressly enumerated in the statute. There is no exception in the State of Mississippi to this construction of our law.

The second theory of the bill herein before stated, alleging that the appellee, Mary B., agreed to and accepted the account and report and permitted Pearce to be discharged, whereby complainants lost their recourse against him and the estate, is equally insufficient in law or equity.

The "account" here alluded to is Pearce's GUARDIAN account, showing balance against him of $2768 03. It is the report accompanying it, informing the court that the appellants claimed an account against the estate, created by Vick, that so much stress is placed upon. Suppose Mary B. did examine the report, and was led to believe that it truthfully set forth a debt due from Vick to appellants, and therefore "agreed" to it, and accepted it as true, what possible legal effect could it have upon her rights? At most, it would constitute an acknowledged item in the general account of Vick, not with the probate but with the chancery court.

But appellants say that by her alleged acceptance of the guardian's account and the report, she suffered Pearce to be discharged from his trust. Suppose she did! Whom does the discharge concern but herself and her guardian? But appellants say that THEY were thereby deprived of their recourse as against him! This conclusion is a legal non sequitur, for several reasons.

1st. The court only discharged Pearce as guardian, not as trustee, and appellants had no claim against him as guardian, because the debt was created by Vick, (according to appellant's theory) as agent of Pearce as trustee—he was not made guardian until years afterward. Secondly, the court had not authority to discharge Pearce from any liability he was under to appellants in either capacity. It lacked jurisdiction over both the PERSONS of appellants and the SUBJECT MATTER of their demand.

If the appellants mean to imply that the surrender of possession by Pearce deprived them of any recourse or remedy, we simply deny that it had any effect whatever on their legal rights; and we affirm their right to proceed against the estate under the doctrine of subrogation through either Vick or Pearce, as the court may decide to be proper, as fully now as before the discharge.

We believe this disposes of all the issues in the demurrer to the original bill, except the statute of limitations.

Whichever was bound or sueable, Vick or Pearce, the statute commenced to run in the life-time of Vick, in April, 1861; and as to Vick or his estate, it does not appear that it has ceased to run to this day, as his representative, if he ever had one, has never been made a party to this suit. As to Pearce representing either himself or Vick, it ceased to run only when he was made a party in 1870. 1 Danl, ch. p. 402, Potts vs. Hines, 57 Miss. p. 737. The limitation was three years.

The Rev. Code 1857 p. 399-400 art. 5, last clause: "All actions of

ced within three years next after the cause of such action accrued, and not after."

The limitation in Equity is made the same as at law by our statute, Code 1857, page 403, art. 39. And without such statute, Equity adopts the limitations applicable at law. Cases cited in George (Miss.) Digest, p. 494

Counting from April 25th, 1861, the last of Vick's debt, to January 29th, 1862, when by Miss. statute the limitation was suspended, and adding the period from the close of the war to the year 1870, when Pearce was made a party, the three years had long expired.

But the State Supreme court said the debt was not subject to the three years' bar, because Pearce's admission made it an account stated and subject to the six years' limitation, and cites McCall vs. Nave, 52 Miss. 494—which has since been deliberately overruled in Floyd vs. Pearce, 57 Miss. 140.

There are divers reasons why an account stated, or a promise or acknowledgment by Pearce could not stop the running of the statute or affix a new limitation.

First. The Revised Code 1857 p. 404 art. 21 enacts as follows: "In actions of debt, assumpsit, or on the case founded upon any contract, no acknowledgment or promise shall be evidence of a NEW or CONTINUING contract, whereby to take any case out of the operation of the provisions of this act, or to deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or IN SOME WRITING SIGNED BY THE PARTY CHARGEABLE THEREBY."

When the State Supreme court held that the statute of limitations of three years did not apply because Pearce's acknowledgment made the account an "account stated," and subject to the bar of six years, it referred for an authority in support of that view to the case of McCall vs. Nave 52 Miss. 494.

That case afterwards came under review in the last named case of Floyd vs. Pearce, 59 Miss. 140, and that doctrine EMPHATICALLY REPUDIATED. In reading the case this court will observe that the language of the Code of 1871 sec. 2165, on which the decision is made, is identical with the above act quoted from the Code of 1857, which was in force during all these transactions, and which was copied after 9 George iv.

The authoritative doctrine in Mississippi enunciated in Floyd vs. Pearce, and reaffirmed afterwards in same volume in Potts vs. Hines p. 737, and recognized in England and all of the States adopting Lord Tenterden's act, is that that statute must be complied with to prevent the bar of the statute, which in this State is the limitation of three years. Were Pearce's acknowledgments a compliance with the statute or not?

The bill alleges that he reported the debt to the Probate court in 1865 as being due from the estate to appellants; and that it was admitted by him to be "correct, due and owing" on 3d October, 1866. The "report" was in writing, of course. But whether the latter admission was in writing or not, does not appear from the bill; but by a fair intendment of the pleading it would appear to have been verbal. As in Equity, the defence of the statute of limitations may be set up by demurrer, we submit that it rests upon the complainant to anticipate that defence and avoid it, by pleading the facts showing

a full compliance with any statute exempting him from the bar.

The statute requires that the acknowledgment must not only be in writing, but it must have been SIGNED BY THE PARTY CHARGEABLE THEREBY. But Pearce was not the party to be charged thereby. He included in his guardian account all the transactions HE intended to be responsible for. He did not report it as a debt of HIS, but as one of Vick's, or the estate. His other admission likewise was not that HE owed the debt, but that some one else did; either Vick or the appellees. It will be remembered that Pearce was exempted by Sarah Vick's deed from all liability for Vick's accounts, and therefore had he in fact admitted a personal liability, it would have been WITHOUT CONSIDERATION, and of no binding force. So that to give his admission any effect whatever it must be by charging some one else, viz. Mary B., whom it appears FROM THE BILL was then of age, married, and in full possession of her estate. Surely the statute must cover such an acknowledgment. And aside from the fact that Pearce could not bind the appellee; and aside from the fact that he would not have been bound by an express promise for want of consideration; he did not, in fact, MAKE any such promise. On the contrary, he at no time admitted the debt to be due from HIM, or in the remotest manner expressed any willingness himself to pay the debt. Such an expression would be necessary to charge HIM, had he even been personally liable, in the fullest extent as PRINCIPAL for Vick's acts under the theory of agency. Bell vs. Morrison 1 Peters p. 351; Moore vs. Bank of Columbia 6 Peters (U. S.) 86. That the acknowledgment must be one in which the party signing intends to charge HIMSELF PERSONALLY, and not a fund in the hands of others. See Angell on Lim. sec. 273, and cases cited; and also must indicate an intention to be held personally liable by being made to the creditor or some one authorized to receive payment and give a discharge. Mayer & Co. vs. McClure, 36 Miss. 389.

The report filed by Pearce would be more like "the RETURN IN AN INSOLVENT'S PETITION OF A DEBT as due the plaintiff," "which affords no inference of a promise, and is not a sufficient acknowledgment." Brown vs. Bridges, 2 Miles (Penn.) p. 424, cited in Angell on Limitations, sec, 233, with other similar cases.

In Mississippi, in the case of an executor or administrator, (being trustees) having SOME active powers attached to their offices, while Pearce had NONE), an express promise of theirs will not affect the bar. Sanders vs. Robertson 23 Miss. (1 Cush.) 389; Angell Lim. sec. 263–266.

Again: we maintain that Pearce had no POWER or AUTHORITY to bind or in any way affect the trust estate by acts, promises or admissions.

In the first place, he NEVER HAD such power. And in the second place his office of trustee and guardian had both EXPIRED when he made the admission in question.

Pearce was a mere "dry trustee." He was debarred from all possession, management and control, all of which was exclusively confided to Vick, and Pearce especially exempted from all responsibility to the beneficiaries or others for any of the acts of Vick. It never belonged to his official character as TRUSTEE to interfere in any manner with the trust estate. Nor were his powers increased, after the death of Vick, by reason of the infancy of the beneficiaries. See

Hill on Trustees, side page 317. Not having had the "implicit confidence" of Sarah Vick, as her husband had, no managing powers were given to him by the deed; and after Vick's death, the Chancery court should have invested him, or some other suitable and prudent trustee, with the power of managing the trust estate as Vick's successor.

In Pearce's character as GUARDIAN, it will not be pretended that he ever had any power to acknowledge the correctness and binding obligation of any of Vick's debts or transactions. In such capacity he could not create debts at all. Moore vs. Cason, 1 How. (Miss.) p. 262-'63. And will not even be allowed for expenditures beyond the annual income. 44 Miss. 364; 9 Geo. 469.

We have said that Pearce had not either capacity of trustee or guardian when the alleged admission and report were made. It appears from the bill that Mary B. had become of age and married when Pearce filed his guardian account in 1865; and hence at that time, when the report was made, and when the admission was made, in October 1866, the trust was a SATISFIED TRUST, and the cestui que trust in full possession and control of the property.

Likewise he had ceased to be guardian; first, under the statute, by which his power ceased at the majority or marriage of the ward. See Rev. Code 1857, p. 462 art, 148; and secondly by the decree of the probate court.

May we not then ask how Pearce, not being personally liable for the debt; not attempting to make himself personally liable; not becoming personally liable by reason of the admission, as a LEGAL result; wholly destitute of any active control when his official relations existed; and at a subsequent period, when both his relations as trustee and guardian had wholly ceased; without any of the requisites made necessary by the statute, and not being the party sought to be charged; could make any acknowledgment that would take the appellants' open account out of the three years' limitation, as against these appellees.

With due deference to the mistaken opinion of our State court, founded upon a subsequently overruled case, we respectfully submit this question to this honorable court. The demurrer to the bill as last amended, as well as the demurrer to the original bill, sets up the bar of the statute. P. R. p. 39.

We come now to the amendments made to the bill in the circuit court. The State court having remanded with leave to complainants to amend and make a case if they could.

The first amendment, in the circuit court, after reciting the leave given in the opinion and order of the State court to amend, and of the circuit court also, goes on to make the following additional allegations:

First. That the said Pearce was a non-resident and insolvent, when he was first made a party to the suit.

2d. Had Pearce paid the debt, the trust estate would have been indebted to him in the full amount thereof.

3d. He surrendered the possession of the estate upon the agreement that the complainants said debt would be paid by the shipment to them of the crop of cotton then growing on the trust lands, which it is alleged was not done. And but for such agreement he would not have surrendered the estate.

The defendants promptly demurred and the demurrer was sustained.

We attack the legal sufficiency of each of these averments. We think the first one is fatally insufficient in this. If the complainants HAD NO CAUSE OF ACTION WHEN THEY FILED THEIR BILL, it was properly dismissed. And the allegation should have been that Pearce was non-resident or insolvent at that time, and not when he was afterwards made a party.

The next averment, viz.: That if Pearce had paid the debt the estate would be indebted to him, is radically defective. IT DISCLOSES THE PERSISTENT PURPOSE OF COMPLAINANTS TO AVOID TAKING THE ACCOUNT OF VICK'S TRANSACTIONS.

We have already argued at length the respective capacities of Vick and Pearce, and have shown, that whatever Vick's legal relation to Pearce may have been, his (Vick's) receipts FROM the trust fund must be embraced in any account taken to affect the fund by his disbursements or contracts. This view of the matter struck his Honor Juge Hill as being too plain for argument, and the monstrous pretension of making the estate liable for its expenditures, without giving it credit for its receipts and payments, was instantly rejected. And we here refer to his opinion in the court below.

The remaining averment, that the estate was surrendered under an agreement to ship the crop, which it says was not done, is in our view equally insufficient in law.

The court will observe at once, that this averment rests upon an ASSUMPTION that the estate WAS INDEBTED to Pearce, or would have been had he paid the debt sued upon, and that THEREFORE he had the right to retain possession until he was paid, or discharged from liability.

To this we reply, that such an assumption is not true in fact, and IS NOT LEGALLY AUTHORIZED by any of the allegations submitted by them for proofs.

In other words, if Vick and Pearce are to be associated as one trustee, the complainants must first tender the issue as to Vick's accounts and claim a balance before they can allege that the estate was indebted to Pearce. We will dwell no longer upon that point, but refer to the opinion of the court below sustaining our views.

Or, if Pearce is to stand alone, then we say, first, that he was exempted from personal liability for Vick's debts by the trust deed, and therefore had no need to retain possession for his own security. Secondly, he settled his account with the court, as appears from the bill, and was found INDEBTED to the estate; hence he had no further right to retain possession.

Or if our view is correct, that Pearce had no legal connection with Vick's transactions, (and this is the view of Pearce himself, and acted upon throughout the whole of his administration) then, clearly, he had no right to withhold possession from his cestui que trust until she should promise to pay Vick's debt to complainants, to the extent of the crop, or to exact any condition whatsoever to the delivery of possession. And having the right to possession, any such agreement by Mary B. or her husband would have been nudum pactum; and its exaction by Pearce would have been a gross violation of his trust.

The defendants deny that any such agreement was made as a condition of surrender, but will state that the defendant A. J. Phelps, by his brother as agent, afterwards did ship the greater portion of

said crop to complainants, and drew out the proceeds, as shown in this record, in payment to Pearce and his overseer, at his request, for their services and commissions. P. R. p. 44, alleging shipment of twenty bales by "Pearce," but which were really shipped by Phelps' agent, as stated. The residue of the cotton was shipped elsewhere, for the purpose of, and the entire proceeds appropriated to, the purchasing of clothing for the freedmen who made the crop, as the sole remuneration for their services therein. If, in a conflict of evidence, it should be held, in any future issue herein, that such a conditional surrender had been made, it would become a question whether the freedmen had such a claim in law upon the crop as would justify the appropriation stated in derogation of such alleged agreement. We are frank to say that we desire to evade the doubt arising in such case, by sustaining the position we now advance, that such a condition or agreement, if made, was not binding upon defendants, either in favor of Pearce or complainants through him. And we therefore respectfully ask the carefui consideration of the court to the point.

We come now to the second and last amendment in the circuit court. This amendment is an intentional tangle of evasive and confused statements, for the manifest purpose again of avoiding the account of Vick's receipts from the fund.

The amendment repeats the averment of non-residence. It then alleges that the account out of which the debt grew was commenced in the name of Pearce, trustee, and was opened in March, 1861, by payment of Vick's draft. It then sets forth in detail the items of the indebtedness, one of which is the sum of $2000 paid by Vick for taxes charged to have been a lien on the lands, and advanced to Vick on the faith of 49 bales of cotton which it is averred were afterwards received from Vick, and the proceeds, amounting to $1850 17, were credited. The balance of $150 is probably sought to be connected in some way with the LIEN of the State which it is too manifest was EXTINGUISHED when the tax was paid by Vick.

It then proceeds to show that Vick died in April, 1861, (the account sued for having accrued prior to his death) and thereupon Pearce took possession and management, and that at his instance the former items contracted by Vick were charged to his (Pearce's) account as trustee, which was THEREAFTER CONTINUED IN HIS NAME as trustee until the account amounted to about $10,000; which sum was reduced by Pearce's payments (made to settle his own part of the account) to the original sum due for Vick's transactions.

It then alleges that when Pearce took possession, the supplies of clothing, &c. were still on the plantation, and as he used them for the estate he became bound to complainants for their value as if he had himself purchased them.

It then alleges that Pearce, in the settlement of his accounts, would have had the right to charge the Vick portion of the account against the estate, and therefore upon payment of said debt the estate would owe him the amount thereof,

It next repeats the averment of admissions by Pearce and defendants, which we have already dwelt upon in arguing the original demurrer.

It lastly repeats the same alleged agreement to ship the crop of cotton then growing to complainants, as a condition of the surrender of possession.

It is manifest to the court that the complainants in this amendment seek to wholly abandon the original theory and facts of their bill, and to carry out their purpose of evading the account of Vick's receipts from the fund.

The original bill, and also this amendment, distinctly show that the account sued upon was contracted by Vick; and in pursuing the estate through him, his receipts must be embraced in the account. But the complainants, with questionable shrewdness, think that if they can make it appear that Pearce also made it HIS debt, by assuming to pay it after he took possession; or by using any of the supplies found upon the place by him; or that the account was originally opened by Vick in the name of Pearce trustee; they would thereby succeed in avoiding any account of Vick's receipts and transactions.

This, in the first place, they would not be permitted to do, as it would, if successful, make an entirely new case. And in the second place, upon legal principles, they are unable to do so.

The original bill pursued the estate for Vick's contracts, and whether properly through Pearce as a legal party or not, necessarily involved an account of Vicks's transactions. The amendment now seeks to pursue the estate solely by force of Pearce's contracts, and to confine the account solely to his transactions. This is a complete abandonment of the first cause of action, and presents an entirely new and essentially different one.

That such a proceeding will not be tolerated, we respectfully submit the following authorities:

Danl's Ch. Pr. vol. 1 p. 425

16 How. (U. S.) 130 (page 144).

12 How. (U. S.) 408 (on page 422).

Story Eq. pl. 212–218 and 884.

And not only is it incompetent to make a new case, but an amendment must not even be INCONSISTENT with the original bill.

1 Danl's Ch. p. 424 note, citing 1 Edwd. Ch. R. 46; 11 George 539; 1 Paige 424; 2 Paige 67.

If the amendment were sound on its face, we therefore submit that it would be obnoxious to both the above objections under the authorities cited, and possibly never disputed.

But again, the allegations are insufficient in law.

First. If it were true, as alleged, that the account was originally commenced and continued in the name of Pearce, trustee, by Vick, whether with or without Pearce's knowledge or consent, (and WHICH IS NOT AVERRED) how could that fact avoid the account of VICK'S RECEIPTS? The averment proceeds on the "AGENCY" theory. But as heretofore argued, if Vick was acting as Pearce's agent for the purpose of charging the estate through him with obligations, must he not also be treated as his agent for the purpose of receiving payment from the estate in discharge of such obligations? The mere manner of keeping the account cannot alter the FACTS of the case. We believe this position is self-evident, and would have been content with merely stating it, but for the persistent and covert attempts to evade it by the amendments.

Second. Assume it to be true that when Pearce took possession he authorized the complainants to charge him with Vick's account, and thereby and thereafter admitted that he was or would be liable for its payment. Is there any legal theory, touching any kind of

fiduciary relation, that would uphold such a promise or admission as AGAINST A TRUST ESTATE, and thereby cut off any and all defences the estate may have had against the original demand?

Is it possible that a trustee can charge an estate, or in any way, directly or indirectly, affect it, by his PROMISES, regardless of the consideration, or regardless of any benefit accruing to the estate from them?

There is not even such consideration shown as would make a promise to pay the debt binding on Pearce himself; but if there were, the liability of the estate to Pearce depends on what BENEFIT HE GAVE TO IT. In settling his account he would have to show the BENEFICIAL NATURE AND RESULT of his contracts, before he would be allowed for them by the chancery court. Could there be any sort of pretense that Pearce's promise to pay Vick's debt to complainant (and for payment of which Vick had defendants' funds in his hands) could be of any possible BENEFIT to the estate, or would have been a proper item for allowance by the court?

Or, if Pearce was already the debtor or promissor through Vick, could he by repeating the promise any number of times add to the liability, or deprive the estate of its right to the account of Vick's receipts? To state such propositions is to answer them. Before passing on, the court will notice the inconsistency of the pleadings. It is first stated that the account was ORIGINALLY OPENED in Pearce's name as trustee—then, that AFTER HE TOOK POSSESSION, the "said items" (created during Vick's life-time) were at his, Pearce's, instance charged to him as trustee "in account, which was thereafter continued in his name as trustee," &c. The truth reflected from the pleader's mind is that it was NOT opened in Pearce's name, but in Vick's.

Thirdly. It is said that Pearce found the clothing, &c. on the plantation, used it for the estate, and thereby became bound for the debt. This position is wholly untenable. Upon the "agency" theory Pearce was ALREADY bound for the debt, and as we have shown, must upon that theory account for Vick's receipts.

But if wholly independent of Vick's transactions, then he received possession of the clothing, &c. as a part and parcel of the TRUST estate. It did not belong to the complainants; they had sold and delivered it to Vick, and he transferred the title TO THE TRUST ESTATE; and in demanding that Vick's receipts be taken in account, we in effect say that Vick was PAID for the clothing by the estate. Could the complainants hold the estate liable through Vick by reason of the original sale, and finding him reimbursed by the estate, then RESUME TITLE to the goods, and assert a SECOND and additional claim against the estate by reason of Pearce's possession? We certainly think not.

This concludes our answer to everything in the last amendment, not already repeatedly met in our argument upon a former demurrer.

If we are sustained in our interposition of the statute of limitations, farther investigation is unnecessary. If not, then we plant ourselves on the principles of subrogation in equity, as affirmed by our State Supreme court, and by his Honor Judge Hill, in both of his able opinions filed herein, and ask that the decree of dismissal be affirmed because the complainants continuously failed and refused to tender an issue embracing the receipts, as well as contracts and